IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

THE ASSOCIATED PRESS, *et al.*,
Appellants-Appellees,

v.

THE UNITED STATES OF AMERICA,
Appellee-Appellant,

Nos. 57-59.

Appeals from the District Court of the United States
for the Southern District of New York.

ORAL ARGUMENT.

Washington, D. C.,
December 5-6, 1944.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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ORAL ARGUMENT.

Tuesday, December 5, 1944, 3:32 P. M.

APPEARANCES:

JOHN T. CAHILL, ESQ., For The Associated Press.

HOWARD ELLIS, ESQ., For Appellants Tribune Company and Robert Rutherford McCormick.

WENDELL BERGE, ESQ., Assistant Attorney General, and CHARLES B. RUGG, ESQ., Special Assistant to the Attorney General, For the United States of America.

PROCEEDINGS

before the Supreme Court of the United States.

ARGUMENT OF JOHN T. CAHILL, ESQ.,

on behalf of The Associated Press:

Mr. Cahill: Mr. Chief Justice, may it please the Court, I appear for The Associated Press. This is a suit in equity under the antitrust laws. The Government charges that The Associated Press, its directors and member newspapers, have combined and conspired to restrain and monopolize interstate commerce in news in violation of Sections 1 and 2 of the Sherman Act.

The suit was filed in the United States District Court for the Southern District of New York; a three-judge court was convened to try the case under the Expediting Act; answers were filed; interrogatories and requests for admission were served and answered; examinations before trial were held, and affidavits were submitted.

The Government then moved for summary judgment. The Government made this motion without trial under Rule 56 of the Federal Rules of Civil Procedure, which permits summary judgment before trial where the record establishes that there is no genuine issue as to any material fact. The Government in making this motion waived all controversial issues of fact and sought judgment exclusively upon such facts as appear on the record to be beyond any genuine dispute.

The three-judge court by two to one decision granted the motion of the Government in substantial part. Summary judgment was thereupon entered.

The Associated Press, to which I shall at times refer as the AP, appealed to this Court from the judgment thus

entered. A member of the AP, the Tribune Company of Chicago, also separately appealed. The Government thereupon cross-appealed. All three appeals are now before this Court.

The issue on these three appeals may be simply stated.

Mr. Justice Douglas: Is there any question in the case, Mr. Cahill, about the use of the summary judgment?

Mr. Cahill: Yes, Mr. Justice Douglas, there is, and while I shall leave it for the most part to my brief, I shall point out at least in one case where the question does arise.

Mr. Justice Black: Would you mind stating what your challenge is to that?

Mr. Cahill: I shall come to the point where the majority below said that they disregard the evidence as to admission of members in the past, not because they do not regard that evidence as pertinent but because they do not regard the evidence as putting the issue beyond substantial dispute. I use that illustratively to show the approach which I think is contrary to the spirit and letter of Rule 56.

Mr. Justice Black: Did you object to the use of it in the court below?

Mr. Cahill: We resisted the motion for summary judgment and insisted that it was inapplicable, and we have by proper exception and assignment of error protected the record here.

The issue on these appeals may be very simply stated. The issue is whether a newsgathering organization formed by member newspapers solely for purposes of greater efficiency must admit into membership and share its news copy on equal terms with papers competing with its members; this despite the fact that it is expressly found by the court below that AP does not monopolize nor dominate the distribution of news. AP is not even found to be better

than other competing agencies nor to be in any wise indispensable to the successful operation of a newspaper.

The majority of the court below held that a successful news agency is bound to admit all applicants on equal terms and that it violates the antitrust law if it fails to do so. The majority accordingly held that AP, because it is a news agency which does not admit all applicants on equal terms, violates the antitrust law. The majority reached this conclusion although they expressly found no monopoly, no domination, no inadequacy of competition, no question of indispensability, and no coercion of anybody. The majority also expressly found that other comparable news agencies exist and that there is a genuine issue of fact which cannot be decided on motion for summary judgment as to whether the general opinion in the calling is that the service of a rival agency is better than that of AP or vice versa.

The court further found that AP has never held itself out to serve all comers, and that many newspapers, including some of the largest and most successful, have grown up and flourished without such membership in the Associated Press.

Now a few words as to the Associated Press itself.

The Chief Justice: Are you going to finish as to suppressive effects of what was done by AP?

Mr. Cahill: Yes, Mr. Chief Justice.

The Chief Justice: Will you at some time tell us what those were?

Mr. Cahill: Yes, Mr. Chief Justice, I will as I develop the argument.

The Chief Justice: They found suppression of competition?

Mr. Cahill: They did not, Mr. Chief Justice. They expressly found that there was no suppression of competition.

The Chief Justice: What was said to be the infringement of the Act?

Mr. Cahill: The infringement of the Act, Mr. Chief Justice, is found in an expression for which a novel title was invented: "full illumination." The majority said that to deprive any newspaper of the service of any news agency of the first rating is to deprive the public of "full illumination" and that wherever that occurs, since we are in the field of news, that that constitutes a violation of the Sherman Act. The majority go on to say that they do that only because this is the press.

The Chief Justice: Only because it is what?

Mr. Cahill: Only because this is the press; that it would be a nice question if this were a case of the ordinary kind, whether they could impose such "hospitality" upon us; if this were a case of fungibles, for example. But because it is the press and for the reasons that I will develop, the majority came to the conclusion that they will impose what they called this "hospitality" upon us.

Now a few facts as to the AP itself. AP is a membership——

The Chief Justice (Interposing): A word further while you are on that subject. They found restraint of commerce?

Mr. Cahill: They found a restraint.

The Chief Justice: What was it?

Mr. Cahill: Arising from the fact that the Associated Press does take into account through certain bylaws that I will develop the effect upon a member in a given city of his loss of the distinctive copy which is AP, arising from the fact that a new member may be admitted in the same city, and it is about that bylaw on admission that this whole case turns; that is the crucial point in this case and I shall develop that bylaw in just a few minutes.

AP, as I have said, is a membership corporation organized under the laws of New York in 1900. AP is a nonprofit cooperative. Its members are newspaper owners. It gathers worldwide news. It relies upon a paid newsgathering organization consisting of bureaus, correspondents, and string men. String men are people who are paid on the basis of what they send in that is used. It does receive one type of local news, that is, spontaneous news from its member newspapers. It also receives Canadian news from an independent Canadian news agency. These latter two sources, however, are of secondary importance.

The news which the Associated Press gathers does not differ in substance from that which the competing news agencies gather. Its competitors also have efficient worldwide newsgathering organizations. I might say that beats and scoops, as they are called, by a newspaper service in this modern era of the telephone and radio rarely occur, and when they do they are of very short duration.

The news of the Associated Press, like that of any agency, is written up with a distinctive style and treatment, so that AP copy does differ in form, although not in the basic facts, from the news reports of these other services. This AP copy with its distinctive form is distributed by AP to its member newspapers.

AP requires its members, when they receive this copy, not to disclose it, before publication, to others, and AP similarly requires its members when submitting copy of their own to AP not to disclose it to others before publication. These precautions are to protect the value of the news report against destruction by premature publicity. These precautions were in substance approved by this Court, I might note, in *International News Service* v. *Asso-*

ciated Press, 248 U. S., and were not found, I might add, illegal *per se* in the court below in this case.

Similarly, the contract for the exclusive exchange of news between AP and the independent Canadian news service was not found illegal *per se* by the majority below.

Now turning to membership policy, the AP has in all 1247 members. Pursuant to the by laws, new members may be elected by a majority vote of the members. The new members pay to the existing members in their locality certain admission fees. Newspapers which do not compete with existing members may be admitted without these formalities. Thus, a newspaper buying out an existing membership steps into the shoes of its predecessor and is automatically accepted as a member.

Again, a newspaper applying for membership to pioneer in a new locality where there is no AP member may be admitted merely by a vote of the directors. This case involves, however, the question whether AP is under any obligation to admit applicants against its will, rather than the precise terms on which such applicants shall be admitted.

Competitors of members are at times denied AP membership. However, as I pointed out before, the majority below said—and I will quote at this time:

> "We disregard all the evidence as to admission of members in the past, not because that is not pertinent, but because it is not persuasive enough to put the issue beyond substantial question."

Competitors continue to grow and prosper without AP membership. This record is barren of a single instance in which the lack of AP copy has prevented the start of a single newspaper, prevented the successful operation of a single newspaper, or caused the discontinuance of a single

newspaper. This record, on the contrary, is replete with evidence that newspapers which never have had AP copy have greatly prospered and that papers using AP copy have deliberately discontinued its use in favor of other copy which they believe to be better and have thereafter prospered without AP. There is nothing in the record, not a scintilla of evidence, and I say that the record is replete with abundant proof to the contrary.

Mr. Justice Frankfurter: Is the value of the AP franchise a factor in the salability of a newspaper?

Mr. Cahill: I would think so, Mr. Justice. I would think, depending on circumstances, it was a sizable factor.

Mr. Justice Frankfurter: I understood that the franchise is an assignment, without leave of anybody.

Mr. Cahill: The membership is assignable on sale.

Mr. Justice Black: There are newspaper situations that haven't AP service?

Mr. Cahill: Mr. Justice, the illustration that occurs to me of that and the best proof in the record is that what is termed the circulation giant of the business, the New York Daily News, achieved a daily circulation in excess of 1,200,000 copies without AP service.

The explanation of this list lies in the existence of these other services. There are two competitive news services—the United Press, to which I will refer as UP, and the International News Service, to which I will refer as INS. The lower court found UP and INS to be comparable in size, scope of coverage, and efficiency with AP.

Mr. Justice Murphy: What about radio service?

Mr. Cahill: That point is not involved here, Mr. Justice.

Mr. Justice Murphy: Does AP have it?

Mr. Cahill: The proof shows that through a subsidiary company, known as PA, service is accorded to radio stations, as is done by UP, but that point is not directly involved in this case.

There are, in addition to AP, UP and INS, on which the court found that the opinion in the calling differed as to which was superior and in respect of which the court refused to make any finding that any one was outstanding, at least twenty to thirty other competitive news services which furnish substantial news reports. Certain of these twenty to thirty could be readily expanded if there were sufficient need to provide services similar to those of the large agencies.

So, looking at the competitive picture, The Associated Press is in no sense indispensable. It does have a larger domestic following than its competitors. It serves 81 per cent in number and 96 per cent in circulation of the morning daily papers, and 59 per cent in number and 77 per cent in circulation of the evening daily newspapers.

The Associated Press, however, is not the only agency serving a preponderance in circulation of domestic newspapers, because many papers take two or more news services. The United Press, for example, serves from 64 to 65 per cent of the country's circulation of dailies; the INS, which is a department of King Features, supplies a world-wide news service which the court below found to be comparable to AP in service and in size and in coverage.

These other services have most substantial followings. They are growing rapidly. The history of UP, which was formed after AP, illustrates that very well. UP is a stock corporation, organized for profit. It was organized after AP, with 369 newspaper subscribers. It has grown until today it has nearly 1000 domestic newspapers and an ag-

gregate of nearly 2,000 subscribers. That news service as well was found by the court below to be comparable to our own in scope and coverage and efficiency, and the court refused to find that any one of the three big agencies was outstanding. It is a disputed fact on this record.

The domestic and foreign subscribers of UP put together exceed the total domestic and foreign subscribers of AP. The UP advertises itself, and I quote, as "the largest and most far-reaching news service in the world," with hundreds more clients than any other news service; the greatest newsgathering resources and a rank of first place among the world's news agencies.

I should like, with the Court's permission, to turn to the majority ruling below. As I have explained, the three judges below are in disagreement. Two of the judges say that AP, in declining to admit into membership all newspapers, has violated the antitrust laws. In the language of the majority, the AP is a combination which is bound to admit all on equal terms.

A judgment accordingly has been entered which in substance enjoins AP from denying membership to newspapers competing with its members. The judgment further enjoins other bylaws of The Associated Press found in themselves not to be unlawful *per se,* unless and until the AP revises its bylaws on membership. The effect of our judgment, says the majority below, is to compel them to make their dispatches available to others. The minority—Judge Swan —dissented vigorously.

I submit that the ruling below was in error. Businessmen have been permitted from time immemorial to associate themselves together in private business organizations, in partnerships, in corporations, and in other forms of association. They have been accorded the right, as a normal incident of such private organization, to choose their own

associates and to keep their products for their own use. They have been authorized, where coercion and monopoly were absent, to deal with whom they pleased. The self-interest of independent business organizations has been thought to be more productive of goods and services than government-regulated public utilities.

The members of The Associated Press in this case have been found guilty neither of coercion nor of monopoly. This Court itself has expressly declared of the purposes of The Associated Press that they are not only innocent, and I quote, "but extremely useful."

Our submission is that the members of The Associated Press were therefore erroneously denied the right to choose their own associates, to keep their AP products for their own use, and to deal with whom they pleased.

Now I shall take up the Government's position in this Court. The Government, in attempting to support the majority rule, advances an entirely novel concept of the antitrust laws. The Government asserts in this Court that when businessmen organize a successful joint organization, they may not keep that organization or its products for themselves. The members of the organization may, like The Associated Press, have scrupulously conducted themselves to avoid coercive or monopolistic conduct, but the Government nevertheless says in this Court that if the members keep to themselves any advantage derived from their organization, declining to share it with competitors, they violate the antitrust laws. The Government accordingly concludes that the members of The Associated Press, in keeping to themselves alleged advantages derived from AP, thereby violate the antitrust laws.

There are at least two answers to this novel theory of the Government.

The Chief Justice: Would you proceed to show us just the precise way in which the Government contends that the AP violates the antitrust law?

Mr. Cahill: I can, Mr. Chief Justice. The Government's theory is very succinctly expressed by saying that it is an egalitarian economic philosophy, an egalitarian concept of economics, that if at any time you gain a competitive advantage through an organization of businessmen that does not take in all applicants, your failure to take in all applicants constitutes a violation of the antitrust law.

The Chief Justice: I had supposed that one of the objects of the Sherman Act was to stimulate competition and that only restraints of competition would be in violation; at least that the first step in the violation of the Sherman Act was a restraint upon competition.

Mr. Cahill: I have always felt it was, Mr. Chief Justice.

The Chief Justice: Now let's get their point. Were restraints found here and, if so, what were their nature?

Mr. Cahill: The only restraint in the crucial field (because even the majority below say this membership bylaw is the turning point of the case, that the other points are of secondary importance), the only violation found, is in the respect that the existing bylaws do provide that there are methods whereby the competitive elements, so the majority says, may be taken into consideration.

The effect of the judgment may illustrate the point more clearly. The effect of the judgment below is to provide that AP must adopt a new bylaw which expressly provides that in the admission of members, the competitive element may not be taken into account. There is a difference between the position of the majority below and the position of the Government in this Court, because the Government in this Court——

The Chief Justice (Interposing): You mean that you may or may not accept as members your competitors?

Mr. Cahill: That they say in effect "must" accept.

The Chief Justice: You must take them in.

Mr. Cahill: You must, under the effect of the judgment below, take in your competitors.

The Chief Justice: If one railroad takes in another competitor, we have been saying for a long time that couldn't be done.

Mr. Cahill: Mr. Chief Justice, I find nothing in the writings of this Court to support the position of the Government in this case, and I shall discuss the cases one by one and show I think——

The Chief Justice (Interposing): I am not pretending to suggest you aren't right, but I do want to understand what their position is.

Mr. Justice Frankfurter: Before you go on with your case, do I understand it is the Government's position (I have their brief, but I have not as yet read it) and legal theory in dealing with this case is on the assumption that they are dealing with the same stuff as though this were peanuts and potatoes?

Mr. Cahill: That is right. The Government abandons the majority theory below that we are going to do this to the press because it is the press, and the Government says, "No; we will do the same to everybody." Let me quote one sentence from their brief, which illustrates the point. At the top of page 67 they say in the first sentence on the page:

> "The combination becomes illegal when, in addition to serving the legitimate ends of economy or better knowledge of market conditions, it is employed to obtain for the members of the combining group an advantage in trade over others excluded from the fruits of joint action."

So, any advantage that is obtained is enough to constitute a violation of the antitrust law.

The Chief Justice: Does that mean, for instance, that a chain store concern that has built up a great record through its capacity to buy and distribute goods, must take in any competitor who would like to belong to the chain?

Mr. Cahill: I don't know how far they would carry it, Mr. Chief Justice, but I do say that it affirmatively appears in their brief that they would apply it, as Mr. Justice Frankfurter says, to the sale of peanuts as well as all other products.

They refuse to follow the line of the majority below that this theory is going to be put upon the press merely because there is a public interest in the news. They do support that as an alternative argument, but their primary reliance is on this egalitarian philosophy that if you combine and as a result of combination there is any advantage, and you don't admit everybody into the group, thereupon you violate the antitrust law. That is the position that they take, that your penalty arises from sheer excellence.

There are several answers on this record to the theory that is advanced. In the first place, in order to arrive at this theory, the Department of Justice has to assume that there is a competitive advantage arising from AP membership. Whether AP members do have any competitive advantage which handicaps non-members is a hotly disputed factual question which the Government necessarily abandoned when it elected to proceed by summary judgment rather than by a full trial. Newspaper after newspaper swore below in the motion papers that, although they never had AP news or had it and dropped it, they had never found the lack of AP news to be the slightest handicap to them.

The lower court, as I said, expressly held that there are services competitive with AP, and of comparable size and efficiency; that AP is not shown to be better than those other services; and that a large number of newspapers, including some of the largest and most prosperous, have grown up and flourished without AP membership.

In the second place, the Government argument in this Court assumes that AP members are not entitled lawfully to obtain a competitive advantage over non-AP members. No court, so far as I am aware, has ever held that, absent monopoly, indispensability, or coercion, the members of a successful organization must share that organization with competitors.

The leading case relied on by the Government is the case of the *United States* v. *Terminal Railroad Association,* of St. Louis, found in 224 U. S. As the Court will recall, in that case certain railroads in the City of St. Louis organized the Terminal Association. This Court held that, because the Terminal Association had achieved a monopoly—due to the topographical situation in St. Louis, it was possible to have only one terminal—, because those roads had achieved a monopoly, which this Court expressly found AP had not, those railroads must admit into membership competing railroads. But this Court went on to state, however, that if those railroads had not achieved a monopoly, they could exclude from the ranks of that Association any competing railroads. I should like to read two sentences from the opinion and to ask the Court mentally to substitute the word "newspapers" for the word "companies" as it appears in those two sentences.

> "It cannot be controverted that in ordinary circumstances a number of independent companies might combine for the purpose of controlling or acquiring

> terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals, but the situation at St. Louis is most extraordinary."

The last referring to the topographical situation.

AP, as a non-monopolistic organization, is obviously free under the express language of this Court in the *Terminal* case (a) to admit newspapers on terms, or (b) to exclude them altogether.

The Government goes on and cites a long list of cases. They go from the *Terminal* case to the *Fashion Guild* case, and they take up other boycott cases in which businessmen have unlawfully refused to deal with somebody for the purpose and with the effect of controlling that person or of driving him out of business. Those cases are totally irrelevant, and on the Government's own admission, because the Government concedes expressly that AP is not and has not sought to control others. Their concession is made express in their brief in this Court on page 69.

The court below expressly found that the purpose of The Associated Press was to provide a more economic and efficient news-collecting organization for its members, and that the effect of AP, Mr. Chief Justice, to answer your earlier question from the record, was not to prevent the successful operation of non-member news services and newspapers.

The absurdity of the Government's contention is illustrated by its suggestion, which is made in its brief in this Court, that whereas AP, my client, allegedly may not deal with whom it pleases, the so-alled "unitary" organizations,

the stock corporations, possibly may. It is all right for them possibly to do it, but clearly we cannot do it. Each of those news services is a joint venture controlled by multiple owners. The fact that the decisions of my client are made by members and that those of its rivals are made by stockholders does not, I submit, withhold from us freedom of action while extending it to our competitors.

This Court has clearly stated on this very point in the *Appalachian* case that a cooperative is not denied privileges enjoyed by corporations merely because of the lack of corporate integration.

The majority opinion below sought to justify its ruling by advancing a totally different theory from the one that the Government now espouses, but one, I hasten to add, equally novel. The majority below said in effect that AP, because it is a news service, is a public utility obliged to deal on equal terms with all competitors of its members. Whether a court could do this, the majority conceded, in a case of what they termed the "ordinary kind," the majority said was a nice question.

Having admitted a concern and a doubt as to the unwanted or involuntary admission of members into any other form of business organization, other than the press, the majority nevertheless decided that, because it is the press that is involved, there is a public interest which justifies the discriminatory application and imposition of public utility obligations upon the press. Though not claiming that the business of gathering news was a public calling at common law, the majority concluded that, since there is a general public interest in the news, they might force upon the press alone a "hospitality" which will bind a news-gathering organization to admit all and to deal with all.

The Chief Justice: How do they relate that to the provisions of the Sherman Act? What provisions of the Sherman Act do they relate that to?

Mr. Cahill: Mr. Chief Justice, it is my further point, which I hope to get to, that I think, with great respect and affection for the majority below, they lost sight of the competitive standard and went off on what I believe is a public welfare standard.

The Chief Justice: Assuming that there is some scope to the Sherman Act besides prevention of restraints on competition, which is the restraint of commerce or has been said to be the restraint of commerce to which that Act is related, if it also has this scope it must be related to some provision of the Act.

Mr. Cahill: Mr. Chief Justice, apart from throwing out the Section 2 allegation, in effect, because they find no monopoly here, there is no reference to anything other than the competitive standard, as you will see when you have the opinion before you. They review all the antitrust cases in this Court, and I now come up with exactly what they have to say as to how they feel they were entitled to reach this result.

They begin by saying that there is a public interest in news, and that that justifies a discriminatory imposition of obligations upon the press. In searching for a label, the majority does not use the expression "public utility," but they substitute one of their own creation, and it is termed "full illumination," an expression which the Government almost self-consciously refrains from using in its brief in this Court. The majority said below, and I quote:

> "To deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have. It is

only by cross-lights from varying directions that full illumination can be secured."

In short, an antitrust statute is used to justify imposing, for reasons of alleged public policy having nothing to do with competition, public utility obligations.

Mr. Justice Frankfurter: Why has it nothing to do with competition and yet, according to the figures, it seems very desirable in most cases to have both services? Therefore, the denial of so important a service as the AP is certainly the withholding of something which would be advantageous to a paper. Competition doesn't mean that it can't get on without it. Competition means that you have not something that your rival has. Therefore, the denial of something presumably advantageous is a restriction of a competitive field.

Mr. Cahill: It is alleged in the complaint, Mr. Justice, that there is a competitive advantage. That is denied in the answer, and the majority in the court below expressly refused to find as a fact that there was a competitive advantage to a person belonging to AP. In fact, it refused to find that AP is the best. It expressly says that there is dispute in the calling as to which of the three is the best.

Mr. Justice Frankfurter: My question didn't go to that. My question went to the theory. You gave us in the beginning the number of papers that have both services. Therefore, presumably both services are advantageous to the conduct of a newspaper.

Mr. Cahill: I say merely that, in the sense that one paper has AP and another has not, that is the only physical fact as to advantage, if such appears in this record. But to go ahead and say that somebody is handicapped competitively because they haven't got AP is a different question and one which is not before us on this record, and one

which the Government, although it argues it *in extenso* in its brief, I submit does so by resorting to disputed facts on which the court below refused to make a finding.

Mr. Justice Frankfurter: I mean you are better off if you have it than if you don't.

Mr. Cahill: I won't go that far. I will say, on the state of this record, all you can say is that some have it and some don't. Whether you are better off to have UP and INS or AP and UP is something that you can't argue on this record.

Mr. Justice Frankfurter: I am not arguing this.

Mr. Cahill: I understand. I am not suggesting that you are.

Mr. Justice Frankfurter: But so many papers have both that I do not think it is a wise thing for the court to say that there must not be an advantage in having both.

Mr. Cahill: I say it would be a speculation, Mr. Justice, and the figures I quoted, as it happened, did not relate to the number of papers that had both. My statement on that was merely that many papers had both, you see. I was referring at the point when I gave figures to the question of how many had AP and how many had UP. But I say to you that on this record, it is a hotly disputed fact as to whether there is any competitive advantage in the sense of AP's being a better service than UP.

Turning to the factual answer to the majority, I submit that they fell into error in finding a factual necessity to impose this public utility obligation upon us, because there is no showing in this record that there is such a lack of "full illumination" to the public that it is necessary to re-make AP into a public utility. The public, as I have said, possesses many news services. A paper having access to any major news service obtains all the news available and much more than it can possibly use.

None of the dispatches of any of these services is withheld from the public. Our dispatches, of course, are printed by our members, and the dispatches of other services are similarly printed by theirs. There are a great number of newspapers in this country. There are 2100 dailies and over 11,000 other papers, and in addition there are the weekly news magazines.

With all this news and information pouring from so many sources, I submit that it is fatuous to suppose that the American public is not fully illuminated or, further still, that the AP bylaws in any way hinder this illumination. At most, as I have said, the question "Is there full illumination?" is a vigorously disputed issue of fact which cannot be assumed on a motion for summary judgment.

Quite apart from factual error, I submit that the majority fell into legal error, because AP possesses no public franchise or grant. It does not hold itself out to serve all, and it is not a monopoly. The Attorney General himself has previously ruled on this subject. In 1915 the Attorney General affirmed unequivocally the right of The Associated Press to withhold membership from competitors of its members. He acknowledged in this express language, and I quote:

> "That newspapers desiring to form and maintain such an organization may determine who shall be and who shall not be their associates."

I should like to spend my last two minutes on my final point, which is the freedom of the press.

I do not claim that the press is exempt as a privileged class from general law. I do claim that the press should at least be as free from Government control as any other business activity. The ruling below clearly imposes sub-

stantial discriminatory Government controls solely upon the press. I have pointed out that the majority holds the AP to be in a class apart from industries of ordinary kinds, and although innocent of predatory or monopolistic practices, it subjects our membership policies, our distribution policies, our prices, and other terms, to sweeping Government control.

The form of this judgment is unimportant. The holding of the court determines the basic principles which are applicable, and there can be no doubt on this judgment that the AP is from now on subject to substantial Government controls. In short, AP can never be free of the fear of Government censure.

The proof of that is already in the record. When the Chicago Sun applied for membership in AP, although the Department up to that time had adhered to the Attorney General's express ruling that AP was free to withhold membership from anyone, after the notice of meeting of members had been sent out, and while the proxies were in the process of circularizing, the Department of Justice loosed twenty-six agents of the Federal Bureau of Investigation to interview the members of The Associated Press voting upon this application, prior to the election.

Thus, when the members of The Associated Press resented this Government pressure and rejected the application, the Government brought this suit to compel its acceptance.

I submit that the principle of this Court has been that interference with the freedom of the press will not be tolerated, unless justified by some clear and present danger. As this Court said in the *Bridges* case:

> "The substantive evil must be extremely serious, and the degree of imminence extremely high."

What is the clear and present danger here? There is no coercion, no monopoly, no dominance, no inadequacy of competition, no indispensability, no lack of publication.

I respectfully submit, in conclusion, that if any danger to the freedom of the press exists in this case, it is the danger solely arising from Government controls, both present and future, arising from the majority opinion below.

ARGUMENT OF HOWARD ELLIS, ESQ.,

on behalf of the Tribune Company and Robert Rutherford McCormick:

Mr. Ellis: If the Court please, I represent the Tribune, a member of AP, the defendant here.

Complementary to Mr. Cahill's presentation, I wish to address myself to the membership restrictions in the bylaws of AP, to analyze them, because it is the contention of my client and myself that ultimately these membership restrictions come down to a well-known category of legal contracts not violative of the antitrust laws or of the common law concepts of restraint of trade; namely, contracts entered into ancillary to a main valid contract of sale by which the seller agrees to accord to the purchaser territorial exclusivity for a limited time with respect to the article bought and sold—in this case, news.

If one applies for membership in The Associated Press from a field and city in which there is no existing member, under the bylaws of The Associated Press that application comes before the directors of The Associated Press. The directors pass upon that application and determine whether they will enter into a contract with that applicant for service, just as the directors of the United Press, of INS, or of the twenty to thirty other substantial news agencies.

Up to this point, the court below said there could be no objection, and apparently there is no objection.

That applicant having been passed upon by the directors, the directors having decided to make a contract with him, to admit him to membership, he must sign the roll of members and agree to abide by the bylaws of The Associated Press, the bylaws of The Associated Press constituting the contract between the applicant and The Associated Press. He applies for the right to obtain AP news dispatches—and pictures and features, but news dispatches primarily—and the right to print those dispatches in a particular paper in a particular city. If granted that right, he may print only in that newspaper and only in that city.

He agrees to pay the assessments of the AP; that is, he will pay AP for the service rendered.

In addition to that, as Mr. Cahill said, he agrees to keep AP dispatches confidential until publication, so that some unauthorized person may not get them.

In addition to that, he agrees to return to AP local news of his vicinage of spontaneous origin; that is, news which he didn't originate in any way. He agrees to return it exclusively to AP. AP, in turn, agrees to send to this subscriber-member its news dispatches.

By the way, the applicant can't hide AP's light under a bushel, so to speak. He agrees that he will publish AP dispatches regularly and will publish them without garbling. It is of great importance to The Associated Press that its dispatches receive public acclaim and be published.

The Chief Justice: Does that mean that they may not be altered in any respect or anything omitted from them?

Mr. Ellis: Not in any respect, Mr. Chief Justice. They must not be garbled.

The Chief Justice: I know of instances of AP reports in some papers.

Mr. Ellis: Oh, they may edit them and leave out portions which they think are not important, and so forth, but if they give a wrong tinge to them, they are subject to expulsion, the contract will be terminated.

The Associated Press also covenants in its bylaws with the subscriber-member that The Associated Press will not furnish its dispatches to any other applicant in his field—that is, morning, evening, or Sunday—or in his city, save upon certain conditions. Originally, way back at the beginning of AP, the covenant was that AP would not furnish its dispatches, that is, admit to membership, any applicant in his city or field at all, or save with his consent, which is the same thing.

I see that the time is up.

(Whereupon, at 4:30 p. m., a recess was taken.)

Wednesday, December 6, 1944,
12:00 M.

Appearances as previously entered.

PROCEEDINGS

before the Supreme Court of the United States.

ARGUMENT OF HOWARD ELLIS, ESQ. (Resumed)

on behalf of the Tribune Company and Robert Rutherford McCormick:

Mr. Ellis: At the close yesterday I was pointing out that the distinctive restrictive feature of this case relied upon in the court below was that involved in the membership bylaws of The Associated Press, restrictions on admissions to membership. I was pointing out that those restrictions on membership when parsed fall into the category of a

grant of a degree of territorial exclusivity to the members of AP who purchase and pay for the AP reports. It is only a degree of territorial exclusivity that is granted. In this respect, notwithstanding the fact that the member in a given field may wish that AP not serve its reports to another newspaper in that field, AP in the contractual bylaws reserves the right to serve another member in that field under certain conditions, namely, a 51 per cent vote of the members, not the directors.

You will remember that if a publisher applies for membership, that is, applies for AP service, and there is no member in his field, it is passed upon by the directors, just as in the case of UP. If somebody applies for UP service the determination to make a contract or not is passed upon by the directors. But in the case there is a member in the field that determination goes to the members of AP.

Second, the applicant, when admitted, must pay to the member in the field a certain sum of money defined in the bylaws, which is 10 per cent of the assessments which have been paid in that field since the beginning of AP. It runs to a very large sum in cities like New York, I think well over a million dollars; in Chicage it is $339,000, and it gets progressively less in the smaller centers.

The third restriction is that the applicant——

The Chief Justice (Interposing): As the case was left below, there is no objection to that charge provided anyone is willing to pay it. Is that correct?

Mr. Ellis: Well, I believe that is not correct, Mr. Chief Justice. I think the contention below was that these two restrictions are so onerous that they amount in effect to an absolute covenant on the part of AP that AP will not admit anybody from the field of a member.

The Chief Justice: As I understand, they will not, but I understood the decree, the view of the court below on it,

is that they should be required to admit them to membership.

Mr. Ellis: Yes, sir.

The Chief Justice: On what terms? In other words, were they to be allowed to be admitted on the payment of this amount?

Mr. Ellis: Oh, no, sir. The court below held definitely that AP may not contract with its members, that in the admission of an applicant from the field of a member, the member in the field might impose or dispense with any condition at all, including the money payment.

The Chief Justice: Is the effect of the decree below to require admission to anyone without payment?

Mr. Ellis: I am not sure of that, Mr. Chief Justice. I believe the decision isn't clear on it, and I may be at odds with my friends on this side of the table. I believe that the decree below would permit AP to exact a payment to it itself because the member admitted shares in the assets of AP. I believe that. But the decree below would prevent any money payment whatsoever to the member in that field.

The Chief Justice: The present scheme is a sharing by groups?

Mr. Ellis: Yes, sir.

The Chief Justice: You think the result of the decree is that the overall cost of building up the AP is shared by the new member paying something, the amount not specified.

Mr. Ellis: I believe, your Honor, that it is the right of AP to contract with its member in the field that if a newspaper is admitted in the field that new newspaper may be required to pay a sum to the member in the field. I would go further. I believe, and it is our contention, that it would be not in restraint of trade for AP to provide

in its bylaws that it would not admit any publisher from the field of an applicant save with that member's consent. I believe that that legal situation——

The Chief Justice (Interposing): Yes, I understood that, but I was trying to find out whether you followed the court below in what the effect of it is.

Mr. Ellis: The effect of it would be that it would be forbidden for the new publisher coming into a field where there are one or more members to pay any sums to those members in the field. I believe AP could require, under the decree below, that the new member, whether it is in the field of a member or not in the field of a member, pay something for the share of the assets of The Associated Press in which he as a member, might at some time or other, on dissolution of AP, participate.

Mr. Justice Reed: What is the reason for having payment made to a member by a competing member coming in?

Mr. Ellis: It was for this reason, Mr. Justice Reed. The United Press and also INS, the Hearst news agency, have what is called asset value contracts, and in those contracts those agencies contract with their subscribers that in the event they dilute the exclusiveness of the news in his territory, he shall receive a certain lump sum of money.

Mr. Justice Reed: Because they were stockholders?

Mr. Ellis: No, sir, no; they are not stockholders at all. They are subscribers.

Mr. Justice Reed: In the other organization?

Mr. Ellis: Yes, sir. They are not subscribers at all; ordinarily they are not; the vast majority of them are not. They are purely commercial agencies—the others.

Mr. Justice Roberts: Then the UP is a corporation and it deals at arm's length with its customers.

Mr. Ellis: Yes, sir.

Mr. Justice Roberts: And it exacts these bonuses, so to speak, in favor of the existing newspaper if it grants a new franchise.

Mr. Ellis: Yes, sir, that is it exactly—not in every instance.

Mr. Justice Reed: Why did the AP give its subscriber a certain share in the money contributed?

Mr. Ellis: Because AP considered and the members of AP considered that the member in the field had built up through constant use of AP, constant payment of assessments, a good will to The Associated Press reports in that field and consequently when some newcomer who had not done so, some new publisher who had not gone to the expense and trouble over the years of doing that, came into that field he should pay some sum to the member to recompense him for what he had given up.

Mr. Justice Reed: Is it fair to say that that was the commercial value of the membership?

Mr. Ellis: I believe so.

Mr. Justice Reed: That is what the loss of the exclusive character would be?

Mr. Ellis: I believe so, yes, sir.

Mr. Justice Frankfurter: Why is there not a competitive factor between two newspapers in the same category? If it has that value, has built up good will, so that the new rival has to pay some money, allowing that new rival to share the opportunity of the AP service, why does that not reveal the fact that it does have a competitive value?

Mr. Ellis: I think undoubtedly that AP service or UP service or any service has a value to a publisher who wishes that service, and he is very glad to get it.

Mr. Justice Frankfurter: So that this is an agreement; whether it is lawful or not is another question, but in effect

the AP is the common name for a lot of independent newspapers. Isn't that the substance of it?

Mr. Ellis: Yes.

Mr. Justice Frankfurter: Therefore, these independent newspapers agree among one another that none admit a rival in its territory and everybody else agrees to the same thing in their respective territories. Why is there not some contraction of the competitive factor?

Mr. Ellis: I am convinced, Mr. Justice Frankfurter, that there is a contraction of the contractual freedom of The Associated Press, or, as you put it, the members of The Associated Press. Looking at this as a partnership (I am perfectly willing to disregard The Associated Press as a membership corporation and look at it as a partnership)——

Mr. Justice Frankfurter (Interposing): But they are only partners in reference to getting the news from a common pool and keeping rivals out of one another's community, except by consent, of course. They are not really partners in business because they don't share the profits of the business, according to you. They merely share the facility of getting the news that the AP furnishes, and also in agreeing to keep others out.

Mr. Ellis: "To keep others out." I would like to parse that. It is keeping others out, in a way, but just like The Associated Press, like all of these minor news agencies, like all of the feature services, that is, advice to the lovelorn, comic strips, everything in the newspaper business is sold to one newspaper in a given field, morning, evening or Sunday, whatever the field is, and there is associated with that also an agreement on the part of the furnisher of the feature, "We will not serve any other publisher in your field because exclusiveness is the soul of competition between newspapers."

Mr. Justice Frankfurter: That raises the question in my mind whether the arrangement of exclusiveness relative to comic strips has the same status in the law as arrangement for exclusiveness regarding the use of the news.

Mr. Ellis: It certainly raises that question. It raises it in my mind, and of course I have an answer to it, I think.

Mr. Justice Black: May I ask a question? Suppose this were a combination between two manufacturers, two independent shoe manufacturers, and they had an arrangement whereby they controlled a third, and they entered into an agreement with each other that they would not let any of their products be sold to any other manufacturer except on an arrangement such as you have here.

Mr. Ellis: I am convinced it would be illegal, Mr. Justice Black.

Mr. Justice Black: It would?

Mr. Ellis: Yes, sir, for this reason. If I understood your postulate correctly, several shoe manufacturers have combined together, and there you have a horizontal agreement among shoe manufacturers, and the doctrine of ancillary restraints, of which I am talking, for territorial exclusivity does not extend to a horizontal agreement among producers or manufacturers; it extends vertically down the line. For instance, International Harvester Company, in the case which is cited, may agree to sell its harvesting machinery to a dealer in a field, in a city, and to sell to no other dealer in that city, and the reason that has been held valid is because it protects the dealer in what he has purchased. It is no wider spacially than is necessary to protect him in the enjoyment of it and it has universally been held not in violation of the Sherman Act or the common law concept of restraints of trade.

Mr. Justice Black: Suppose these shoe manufacturers had exactly the same program that you have here.

Mr. Ellis: If you have an agreement——

Mr. Justice Black: I mean the agreement that you have in The Associated Press; the members of The Associated Press, let's suppose, are shoe manufacturers, and you have an agreement exactly as they have, an arrangement of selecting members as you have here, the same in every respect with reference to the working, except that one is news and the other is leather.

Mr. Ellis: I don't think there would be a doubt about its validity.

Mr. Justice Black: Not a doubt?

Mr. Ellis: I am convinced it would be valid under the authorities.

Mr. Justice Black: You treat them just the same as you treat any other commodity?

Mr. Ellis: I do in this discussion, and I think I am entitled to, for this reason. An indispensable agency of the press, so found by the lower court, is brought here because of an act which relates to trade and commerce. Certainly the defendants are entitled to speak of themselves as engaged in trade or commerce. That is the only reason they are here. I believe that the intellectual product——

Mr. Justice Murphy (Interposing): You believe it is an intellectual product?

Mr. Ellis: I do, Mr. Justice Murphy. I make this distinction: that the territorial restrictions of which I am speaking should have greater validity in the case of intellectual products than in the case of merely fungible goods. Naturally, the intellectual product of an individual or a group of individuals is more closely personal, if there is a degree of personality, than merely fungible goods like leather or rubber or anything else.

Mr. Justice Murphy: He may choose to whom he wishes to distribute or disseminate it.

Mr. Ellis: Exactly, exactly. I think that is an additional reason, but for the purpose of this discussion I am perfectly willing to treat news dispatches as merely fungible goods, and I think under the ordinary rules laid down by this Court in the case of fungible goods, the defendants should be exonerated. When you add the additional factor that this is an intellectual product, in my judgment there can be no question about it.

Mr. Justice Frankfurter: The defendant has extended the fullest availability of that on which judgment under a democratic society can be given.

Mr. Ellis: That is right. May I add in that respect, in this particular case the court below, adopting that construction, ruled out of consideration and did not discuss in this connection the effect of these territorial exclusivity contracts in their effect on competition, trade, or anything of that nature. The court discussed them from the viewpoint of whether they prevented "full illumination".

In our brief we have pointed out (and had I time I should love to here) that it is impossible on a motion for summary judgment to determine whether or not the outlawing of these territorial restraints will produce fuller dissemination or not, because the court on a motion for summary judgment where the facts are in dispute cannot go into the ultimate effect on the industry of outlawing these restraints.

Mr. Justice Frankfurter: Did you indicate what you would show if you had gone to trial?

Mr. Ellis: There was the testimony of McCormick on that, who said that in his judgment, and my friends have cited the *Sartor* case saying that opinion evidence is totally inadmissible on summary judgment,——

Mr. Justice Frankfurter: As I understand it, your complaint is that the motion should not have been entertained, that you should have been allowed full inquiry in the course of regular trial.

Mr. Ellis: Certainly before outlawing these.

Mr. Justice Frankfurter: Is that your position?

Mr. Ellis: Yes.

Mr. Justice Frankfurter: You did take that point below?

Mr. Ellis: Certainly.

Mr. Justice Frankfurter: Then I ask whether there was any indication of what kind of evidence you would have offered had the motion been denied and had you gone to trial.

Mr. Ellis: There was no tender of evidence, Mr. Justice Frankfurter. One thing has been raised in the discussion, I think, with Mr. Justice Black. I am perfectly willing, for the purposes of my discussion, to consider this as a co-partnership, that this is an agreement *inter sese* amongst all of the publisher members of AP, and I claim that a partnership as well as a corporation in the sale of its goods may enter into these natural, normal, ordinary contractual limitations, just like the producer of films, when he licenses them, may agree with his licensee to give clearance. Just as in the case decided by Mr. Justice Frankfurter where the Federal Communications Commission has passed a regulation permitting chains to agree with their outlets to serve but one station in a community and not to serve another. The Mutual Broadcasting System is composed of independent stations banding together in a sort of cooperative—not exactly, and yet that ruling applies to the Mutual Broadcasting System. It may license its outlets to use its programs and to agree with them not to serve any other outlet in that community. It runs through the whole law. It was first stated in the *Addyston* case by Judge Taft. This is the

first case, so far as we know or have been able to find, and we have cited in the appendix to our brief I think twenty-six or twenty-seven industries in which these ancillary covenants have been sustained—this is the first case, I believe, in which they have not been sustained. In this industry particularly (and I treat it as an industry), exclusiveness is the heart and core of all competition, and the normal characteristics of competition between newspapers and between news agencies should be preserved. This is the normal characteristic of such competition.

Let me tell you one effect which I think is quite obvious will follow if this decision stands. The court found that there are today three major news agencies. There are three or four knocking at the door, just about to become major news agencies. Take The New York Times. Meinholz and James of that company testified that The New York Times has a news agency. It doesn't sell to anybody in New York; it sells to outside papers, and it grants to the outside papers to which it sells, this same territorial exclusiveness. I say it is a complete territorial exclusivity. Suppose it is held that The New York Times must, if it sells to anybody, eliminate this provision for territorial exclusivity. It would certainly cease selling because it would have to serve its competitors in New York and it will never grow into a major news agency. The New York Times is not the only one. Reuters is coming into the field. Transradio is knocking at the door. The effect of this decision will be to limit the great news agencies to these three, whereas the condition now among news agency competitors is very healthful. They are all competing; two or three or more are ready to become as comprehensive as these three, and I think the result of the decision will necessarily be to limit their growth. That doesn't make for full dissemination.

There are other questions on this full illumination thing, Mr. Justice Frankfurter, that were not gone into.

The court below said, "We will not determine in this decision how far down the line this principle we enunciate shall go. Suffice it to say it will apply to these three for this time."

Suppose, as a matter of fact, as my friends here say in this Court, it only applies to The Associated Press because it is a cooperative. It necessarily means that The Associated Press is put in a detrimental bargaining position, a detrimental competitive position, vis-a-vis UP and INS, because those two may select their customers, may agree with their customers, may grant territorial exclusivity, may grant different terms of service, whereas AP will be required to serve and to serve on equal terms. So not only will this decision prevent the growth of other agencies (that is coming into this comprehensiveness), but it may have the effect of hurting AP in competition with purely commercial agencies formed as commercial corporations.

So that being unable to go into those factors on motion for summary judgment,—I see my time is up. I wanted very much to correlate my thought of ancillary restraints in connection with the First Amendment, but it isn't possible.

Mr. Justice Black: Have you in your brief your explanation of the summary judgment procedure, and set out therein what evidence you think should have been heard and what should have been determined and what not?

Mr. Ellis: Not in that fashion, Mr. Justice Black. We have taken the evidence as it was and pointed out that certain facts are in dispute and could not be decided at this time. We have pointed out that opinion evidence, which certainly in this case is of the greatest importance, cannot be entertained. What will the effect of this decision be on trade and competition, which we think is the only consideration that should be considered—not this "full illumination"? The principle should be that if there is free competition in

this industry, the Court will assume in a Sherman Act case that the full illumination will follow, or such degree of full illumination as Congress intended as the policy of the land.

Mr. Cahill: Mr. Chief Justice, might I add that on behalf of The Associated Press and the other Appellants we have set forth in an appendix to our Reply Brief the disputed questions of fact on which the Government here is forced to rely to sustain its position.

ARGUMENT OF CHARLES B. RUGG, ESQ.,

on behalf of the United States of America:

Mr. Rugg: May it please the Court——

Mr. Justice Douglas (Interposing): I have read your brief, Mr. Rugg, and I haven't got the answer to this summary judgment business, which bothers me quite a bit. I don't want to interrupt you in your argument as you go along, as you do not have very much time, but I yet fail to see, at least I am troubled in my effort to see, how you could try a complicated antitrust suit by summary judgment as was done in this situation. If as you go along you could help me out of that difficulty, I would be very grateful. I don't find your brief helps me. I have examined that very carefully.

Mr. Rugg: I don't want to avoid answering the question, but I prefer to do it as I go along.

Mr. Justice Douglas: That is why I am asking it now, I don't want to interrupt you as you go along.

Mr. Rugg: The ultimate question in this case is whether an agreement in the form of bylaw of The Associated Press between the 1247 members who constitute an overwhelming majority in number and a dominating group in influence and supremacy in the industry, which agreement has the purpose and effect of excluding nonmember newspapers

which compete with member papers from the news and news pictures gathered by and interchanged through The Associated Press, is illegal in violation of the Sherman Act, for any of the following three reasons: First, because it is a combined refusal to deal for competitive reasons, as was discussed in the *Fashion Originators* case; second, because it is a combined denial to nonmember competitors of the fruits of a joint action for competitive reasons, as was discussed in the *Sugar Institute* case; or, third, because under the application of the rule of reason it is unduly detrimental to the public interest, public interest measured by the impact not only on the nonmember competitors, but also on the ultimate consumers of the news, the newspaper reading public, to artificially restrain the widest possible dissemination of news solely and exclusively in order to protect the competitive privileges of the individual members of The Associated Press.

The court below found that agreement illegal under the Sherman Act on the third reason, and its reasoning ran roughly as follows. The bylaws of The Associated Press constitute an agreement among each of the 1250 members of The Associated Press. A news service is essential to the successful operation of a newspaper. AP is the largest and most popular of the news services in the country. Newspapers are both wholesalers and retailers, both vendors and vendees, both producers and intermediate consumers, and they actively compete with each other in both of these capacities.

The purpose and effect of the bylaw contract (I am stating now the reasoning of the court below) is to restrain competition by withholding this important commodity, the AP news service, from non-member competitors to protect the competitive advantage of the members of The Associated Press. Consequently, the contracts between AP

members are in restraint of competition in interstate commerce.

Still continuing with the reasoning of Judge Hand, although all contracts or combinations in restraint of competition of this character are not illegal, the court weighed the advantages gained against the injury done to the public, both factions of the public, and after balancing these interests the court determined that this combination was in restraint of competition, that it was incompatible with the public interest, first as measured against the competing nonmembers who are deprived both of AP and the choice of selecting one or more of the services, and, second, the ultimate consumer, and they defined the ultimate consumer's interest as to have promoted the dissemination of news from as many different sources and with as many different facets and colors as possible.

The decree on this line of reasoning left to The Associated Press the duty of reframing their bylaws so that the discrimination against competing nonmembers could not be exercised. The kernel of the decision is merely an old-fashioned orthodox application of the rule of reason to a restrictive combination for competitive reasons in the field of news. The underlying purpose of the decision is to remove the concerted discrimination as against applicants who compete with an existing member on the one hand, and in comparison with those applicants who do not compete.

The judgment seeks to strike down the inequality in terms and conditions of admission between those two characters of applicants.

The decree does not require admission of all applicants. It does not impose any even limited public utility obligations on The Associated Press. It does not require the

furnishing of AP news either before or after publication to nonmembers, nor do we urge any of those things.

The Chief Justice: Will you explain the last statement, saying what it does not do? I had rather thought up to this time of what it did do, but I don't want to state the terms of the decree.

Mr. Rugg: It does not require the admission of all applicants. I am going to develop in a moment that presently non-competing applicants are admitted by the Board of Directors and the history shows that about 95 per cent of applicants of that character have been admitted and 5 excluded, as compared, strangely enough, with precisely converse percentages where there were competing applicants. There 5 per cent were admitted and 95 per cent were excluded.

The Chief Justice: You mean it does require admission of all, though competing?

Mr. Rugg: No. It does not. The decree of the District Court requires, through amendments to the bylaws, that the same consideration be given applicants who compete with member papers as is given applicants who do not. The decree in effect requires that applications of both competing and non-competing papers shall be viewed in the same light and judged by the same standards and criteria.

The Attorney General has invited me to discuss the facts and the law on the illegality of the bylaws in so far as they impose this discriminatory limitation on the admission of competing applicants. The Assistant Attorney General, Mr. Berge, will argue the legality of other restrictive provisions of the bylaws, the alleged abridgment of the freedom of the press, and the very important question as to the form of the decree.

The District Court, as required on a motion for summary judgment, confined its considerations to facts about

which there was no genuine dispute. Pursuant to the rules it made 151 findings of fact. But these findings do not include nor could they reasonably be expected to include all the facts in the record that are disclosed to be without substantial controversy or as to which there is no genuine issue. Those facts generally fall in the category of allegations in the Bill of Complaint that were formally admitted in the answer, answers to requests for admission, answers to interrogatories, and unchallenged affidavits on questions of fact.

There are but four primary and basic factual theses on which this action is predicated. The first one is no longer in issue, namely, that the defendants are engaged in interstate commerce. That was specifically found as a fact and has been ruled by this Court in the *National Labor Relations* case and is not challenged in error here.

The second factual thesis is the bylaws of The Associated Press, their historical development, and their unchallenged contractual nature. The resulting restraints to the competitive interchange and commerce of news and news pictures through this collective action are not in dispute.

The third factual thesis is the position of outstanding importance and preëminence of The Associated Press in the field of newsgathering and news distribution. That fact is not in dispute. There is no issue concerning it.

Mr. Justice Black: What was that one?

Mr. Rugg: The outstanding preëminence and importance of The Associated Press in the field of news services.

Mr. Justice Roberts: What do you mean by that, exactly, because I understand that your opponents say that the record shows that one service is as good as another, that The Associated Press isn't generally considered better than the others, and if there is any issue as to whether one

was better or bigger than another, they want a chance to try that dispute.

Mr. Rugg: There is a finding of fact which is not challenged by assignment of error that The Associated Press is the largest and the most widely used of all press services now operating in the country or that ever has operated.

Mr. Justice Black: Suppose there is a finding of fact among the facts that were produced on the summary judgment.

Mr. Rugg: That finding is not challenged.

Mr. Justice Black: They asked for the privilege of offering more evidence in a regular trial.

Mr. Rugg: They haven't challenged that fact by assignment of error.

Mr. Justice Roberts: They objected to summary judgment being entered, didn't they?

Mr. Rugg: They have challenged some facts. They haven't challenged that fact. They haven't challenged the fact which I have stated that The Associated Press is the largest and is the most popular of the news services in the country.

Mr. Justice Frankfurter: The refusal was to claim quality superiority.

Mr. Rugg: Yes. From the fact as I have stated it to which there is no challenge, I think the consequence of the judgment flows without getting into the realm of disputed facts. I shall come back to your question from time to time as we go on, Mr. Justice Douglas. Then there are one or two collateral questions, the more important one, the cartel agreement with the Canadian press.

Mr. Justice Roberts: You said there were four. You stated the third. What was the fourth?

Mr. Rugg: The fourth is the cartel agreement with the Canadian press. It implements the whole scheme.

Mr. Justice Douglas: A problem that is more deep-seated than what you have put is that you may get a collection of instruments that could be viciously used. The question is whether or not as part of the proof of your case you would have to prove a use that was anti-competitive, anti-social.

Mr. Rugg: I am not avoiding your question, but I can't answer it in a sentence and I think as it develops you will become completely satisfied on that, Mr. Justice Douglas.

There are 1247 members of The Associated Press. That is out of a total number of daily newspapers in the United States in 1942 of 1853. The governing rules, bylaws of The Associated Press, permit the furnishing by it of its news and news pictures only to members. It forbids the interchange of its news with nonmembers. The bylaws are a contract, so specifically found as a fact. The bylaws themselves so provide.

The news which is collected generally falls into two categories, domestic and foreign. Mr. Cahill explained in general how that is collected. Domestic news is collected by bureaus maintained by The Associated Press (there are 94 of them in this country); by string operators, people who are on a contingent, part-time basis; and primarily by the sending in of the local spontaneous news from the vicinity by the members of The Associated Press, and to AP and its members exclusively, to which I shall come later. The domestic and foreign news is purchased, purchased from other agencies. They have bureaus of their own. They have string operators in foreign countries, and they get now a vast deal of it by foreign radio.

The cost of the collection of this news is distributed among the members in the form of an assessment, and this

form of assessment is on a superlatively complicated formula predicated generally on the population or the reading population in every community. A community is assessed so much and then the division of that community is divided among the number of AP papers that may be in it.

AP furnishes news pictures to its members. That is not a part of the news. An extra charge is made for it. But the news pictures are available only to The Associated Press members. The same procedure is followed as to features and comics and Sunday magazine articles.

In 1941 the AP formed a subsidiary known as The Press Association, which is engaged in the purely commercial venture of marketing radio news, not to members; the members do not get it unless they purchase it in the open market. It is sold to radio station operators. Every hour of the twenty-four the AP news is condensed into radio broadcasts and sent to the world.

The affairs of the AP are managed by their Board of Directors. In many important aspects their powers are plenary. They have complete jurisdiction over the assessments, both determining the method of the usual assessments and extraordinary assessments. They have complete and final authority in disciplinary action, even to the extent of dismissal of members for violation of bylaws, and finally the bylaws cannot be changed even by a vote of the members without an approval of two-thirds of the Board of Directors. These powers have a startling significance in view of the method of the election of the directors. The members do not have equal voting rights in this respect. All the members have one vote for a director, but there have been bonds issued from the inception of The Associated Press in 1900. In the election of directors every holder of a bond is given one vote for every $25 worth of bonds that he has, provided he has waived the payment of inter-

est on these bonds. There are a quarter of a million of the bonds outstanding and every bondholder has waived the payment of interest. Thus a bondholder may get 41 votes as against the one vote of the ordinary member.

The District Court specifically found that fact, which is not challenged, that the bondholder vote rather than the membership vote, and I quote, "completely controls the selection of directors."

As to the bylaws, the AP functions under them. These have been frequently and radically revised during the forty-four years of existence of The Associated Press. In 1942 they were rather fundamentally amended. We shall consider the 1942 amendments. Article III provides for the admission of applicants. Section 3 of that article provides that the directors may elect an applicant, and I quote, "in a field where there is no existing membership or if all the members in that city or field waive or release the right given under the bylaws to receive the money payment from the applicant." Thus, where no competitive interest of a member of AP is involved or where it has been waived for any reason which your imagination may suggest, the directors have untrammeled authority to admit or exclude such an applicant.

The bylaws provide no standard for the admission of members. During the forty-two years, 1900 to 1942, there had been some 1800 admitted and 5 per cent excluded by action of the directors. It is illuminating on the action of the directors to note what Mr. Noyes, the President of the AP for its first thirty-eight years, said in discussing this phase of the action by the Board of Directors at the annual meeting in 1922 (it is in the record; I quote it): "In no case has the Board elected or recommended election when it felt that any real injury was done to a member. In no

case, I think, has an election by the Board or by the membership resulted in any real injury to a member."

But more significant is the artless candor with which the bylaws treat the situation where the competitive interests of AP members are involved. Section 1 of Article III provides that if there are one or more memberships in the applicant's city or field (the field means the morning or evening papers), the election can only be held by a majority vote of the entire membership, and under the prevailing practice those elections invariably develop into proxy battles. Even in 1942 the President of the AP invited a competing applicant to solicit proxies and sent him a complete membership list to facilitate that effort.

But even after an affirmative vote of the majority, the applicant cannot be admitted under the provisions of Section 2 of Article III until he shall pay to The Associated Press (and I come back to that) a sum equivalent to 10 per cent of the total amount of assessments paid by the members in that city or field from the beginning of the world until the end, from 1900 until the date of admission, or three times the current annual dues, whichever is greater. These moneys are paid not to The Associated Press beneficially, but merely as a conduit for distribution to the competing members in that city.

As has been in effect conceded, these sums are substantial and onerous. In New York City they amount to a million three in the morning field. In the City of Washington, for instance, they amount to $182,000 in the evening field. This is what you have to pay your competitors.

Mr. Justice Frankfurter: The amount they pay for the news service, for that privilege?

Mr. Rugg: That is right.

In February, 1943, six months after this suit was brought, this bylaw was rather frantically amended by omitting the requirement that the payment should be not less than three times the current annual dues, so as it now reads it is only 10 per cent of the total payments made from 1900 to the date of the application. That mollifies somewhat the amounts, but they are still burdensome. In New York they are currently over $800,000.

Mr. Justice Frankfurter: Does the record show the annual assessment?

Mr. Rugg: No, but the court found as a fact the amounts payable under this Section 2 of Article III, both prior to the 1942 amendment and subsequent to the 1943 amendment. That is Finding 118 on page 2624 of the record.

These amounts are not computed on any proportionate value of The Associated Press assets. The debate at the annual meeting at which these bylaws were adopted indicates beyond peradventure that it was an arbitrary amount. Neither non-competing members nor the AP receive anything from this payment by the competing applicant. Non-competing applicants are not required to make any payments. Never in the history of The Associated Press has any contribution or purchase price been exacted from an applicant payable to The Associated Press itself. Obviously, it is a compensation to competing members for the loss of a trade advantage, for the loss in value of the membership arising out of the applicant's improved position as a competitor. It is a penalty on a competing applicant. It acts as a deterrent. It is a barrier to admission.

The practice is sought to be justified on the theory that it merely reimburses the member competitors for their share in the capital assets which they must yield out of their collective interest to a new member, but to this there are two, we believe, devastating answers. First, no such pay-

ment nor any payment is required of an applicant who does not compete with a member, although he becomes equally a co-member of the capital assets and would be entitled to his proportionate share on dissolution. Second, the percentage of payment is not in fact computed upon the value of the share in the capital assets to which the applicant is entitled. It has no relation to that whatever.

Nor are these the only barriers. The third barrier is in Section 2 (b) of Article III. In addition to the majority vote——

The Chief Justice (Interposing): On this point of barriers, are we not entitled to consider this from the point of view as to whether they could refuse admission on any grounds?

Mr. Rugg: Our contention is that the bylaws themselves implemented by their history disclose that admissions have been refused for the competitive advantage of the members. We say that that *per se* is bad or certainly bad under the rule of reason. There may be other reasons why the applicants should be excluded.

The Chief Justice: I would like to ask you whether you think that is this case or whether it isn't. Suppose a group of competing manufacturers enter into an arrangement whereby each one gathers credit information, I mean information as to the people with whom they deal, to whom they are giving credit. They exchange it. They accumulate through the years a great deal of valuable information which is made available to all the members of this group but is not furnished to any competitor outside the group. Does that violate the Sherman Law?

Mr. Rugg: Of course, that is just an embellishment on several of the trade association cases that have been before

this Court. As I understand the law, a collective joint accumulation of trade statistical information that would be of benefit to competitors——

The Chief Justice (Interposing): I had in mind a particular commodity, namely, credit. I think the cases have said that if that is all that was done it was not a violation *per se.*

Mr. Rugg: I think it is a question of degree, and your question, Mr. Chief Justice, probably falls in the all right group.

The Chief Justice: And what I am wondering is, assuming for the moment that that is, as I believe under the decisions it is, not a violation of the Sherman Act, does that differ in its essentials from the case you have here? These people by doing this get a competitive advantage because they have obtained valuable information in their business, not by suppressing competition among themselves, but by gaining valuable information.

Mr. Rugg: But it is a question of degree. I think that if the kind of information that was collected and distributed to members and denied to non-members in the *Sugar Institute* case and *Lumber Association* cases was bad, that the kind of information collected and denied in The Associated Press case is bad.

The Chief Justice: Well, I stick to my original proposition that the gain is merely credit information, which is of a kind which has been thought not to be a suppression of any kind of competition, and the injury which results to competitors lies solely in the fact that this group has some information which they gained at their own trouble and expense and which is not available to competitors.

Mr. Rugg: I think the answer to that, Mr. Chief Justice, is that it is a question of degree. All those cases have

been decided, perhaps not admittedly, but in fact by application of the rule of reason.

The Chief Justice: Well, I should not take it that way.

Mr. Rugg: Well, they haven't been found unreasonable restraints.

The Chief Justice: Only from the point of view of whether this particular thing was a suppression of competition which brought it within the Sherman Act is my point, and what I am trying to isolate here is this question.

Mr. Rugg: The difference is that the kind of commodity collected and distributed here to members and denied to non-members is much more vicious in its impact and effect on the people who don't get it than the credit information, and it is so bad, so much worse——

Mr. Justice Roberts (Interposing): Isn't that a question of fact? Isn't impact on the competitor here a question of fact? You say it is vicious, greater than in other cases. Was that question decided below?

Mr. Rugg: There was no dispute nor any proffer of evidence as to the fact of denial. Nor was there any dispute or any proffered evidence as to the——

Mr. Justice Roberts (Interposing): Where do you get this viciousness of the impact in this particular field?

Mr. Rugg: I am just about to explain it.

Mr. Justice Roberts: Is that admitted, or how do you get it?

Mr. Rugg: Well, in effect it is admitted. It is alleged specifically in paragraph 78 of the Complaint.

Mr. Justice Roberts: What do they say to paragraph 78, admit it?

Mr. Rugg: No, paragraph 78 is denied, but in the answer of The Associated Press they say—it is printed on page 61 of our brief in a note.

Mr. Justice Roberts: Then all this argument to the effect that impact on another competitor is not serious, that you get all these things otherwise, isn't in this record. You are making that up.

Mr. Rugg: I haven't answered your question yet. The AP answered affirmatively in their answer, I quote: "that an AP member would enjoy no competitive advantage over others if this were open to everybody." I think that indicates that is an admission on the part of The Associated Press that there is a competitive disadvantage in the denial.

Mr. Justice Roberts: I suppose it would be for a man who wasn't admitted to a cotton exchange or stock exchange.

Mr. Rugg: It might or might not be.

Mr. Justice Roberts: Then if it might or might not be, isn't that a question of fact in either case?

Mr. Rugg: The court below in dealing with the second measure of the rule of reason went on the injury to the reading public. That was not denied. There was no issue of fact raised about that whatever.

Mr. Justice Roberts: How was that brought into the record? Did the Government allege injury to the reading public?

Mr. Rugg: It alleged injury to the consumers of the commodity.

Mr. Justice Roberts: That is the public? Is that the reading public?

Mr. Rugg: I should think it was.

Mr. Justice Roberts: I thought they meant the papers that bought it by that allegation.

Mr. Rugg: I think the ultimate consumer of the news is the man who reads it.

Mr. Justice Roberts: Then you think it stands admitted here by the defendants?

Mr. Rugg: I don't think it is disputed.

Mr. Justice Roberts: That the reading public is injured by its organization?

Mr. Rugg: I don't think there is any challenge to that fact, either proffered or actual.

Mr. Justice Frankfurter: There is no concession at any time in the Government case, is there, that the agreement that the by-laws constitute implies a restriction of competition among the members of AP? The question is whether the restriction whereby others come into the benefit of this pool involves an injury.

Mr. Rugg: Yes, it admittedly involves restraint. The question is whether it is illegal restraint.

Mr. Justice Frankfurter: I wanted to know whether I am clear in my mind that any suggestion lurks in the case that there is any kind of restraint of competition as among AP members.

Mr. Rugg: I don't think so.

Mr. Justice Frankfurter: The question is whether their getting others out is restraint.

Mr. Rugg: That is right.

There is one other barrier. This, again, is in Section 2 (b) of Article III. After a member has qualified by the vote and has paid this money, then he is required to relinquish to his competing members in that city and field any exclusive right as to any news or news picture service which he may have had and (I am quoting):

> "When requested by any competing member to require such news or news service to be furnished to such member upon the same terms as they had been made available to the applicant."

Compliance with this requirement involves the affirmative contractual assent of a third party. The applicant cannot avoid the dilemma by relinquishing the service if elected, as the requisition is on all services that he had at the time he filed his application.

That this was an insurmountable bar to admission, and it was conceived and planned as such, is perfectly apparent from the minutes of the annual meeting at which that provision was adopted. Mr. Knight was the chairman of the drafting committee that reported this amendment. His committee reported. He spoke against it on the floor of the meeting of The Associated Press. He said that it constituted an absolute barrier and recommended that that provision should be eliminated in the final adoption, but the debate following that indicates beyond peradventure that the vote of adoption was consciously and intentionally passed to create an absolute obstacle to admission that was within the complete control of the papers competing with the applicant. The court below recognized this and condemned it without qualification.

The AP seeks to defend this conditional veto and the restrictions on admission on the ground that, if The Associated Press is deprived of the right to choose its associates, the distinctive character of the organization would be lost and the assurance of unbiased and impartial news reports will no longer exist. Superficially that is an appealing reason, but in fact, in realistic practice, it is fictitious. Membership in AP, in truth and in fact, is a commodity that is bartered and sold on the street. Article III, Section 4, of the bylaws provides that a successor to a member, however he may acquire that status, becomes entitled to all the rights of membership upon the formal signing of his assent to the bylaws.

Thus, no restraint is exercised over the choice of that kind of associates. There may be a complete change in the character and quality of a newspaper by that change of ownership in that method.

Mr. Justice Frankfurter: Mr. Rugg, if I got the implication of the Chief Justice's question clearly (I may have misunderstood it), it was that your case is neither stronger nor weaker than if you had a case where there was no elaborate bylaw structure, but a frank, simple, unqualified claim that the AP members could keep out anybody they wanted for no reason or a good reason or a bad one.

Mr. Justice Roberts: In other words, that under this decree, they couldn't now close their membership. That is right, isn't it, under the decree?

Mr. Rugg: No, that isn't right under the decree.

Mr. Justice Roberts: Do you mean to say that the Government would be satisfied with a new bylaw which said the membership of the AP is now closed and no new members will be taken hereafter?

Mr. Rugg: That is a complicated question to answer. Of course we would not be satisfied with a freezing of the membership as it is, because that would freeze out all people who have been excluded for competitive reasons. If they were to——

Mr. Justice Roberts (Interposing): Such a freezing wouldn't comply with this decree, would it, in the Government's view?

Mr. Rugg: No, but let me finish my answer, Mr. Justice. If they cleaned house, if they admitted everybody who had been improperly excluded, and if they admitted everybody today who wanted admission and who might be excluded on the grounds of competition, then they could freeze their membership and say, "We are now a closed shop," and that might well not be in violation of the Sherman Act.

Mr. Justice Frankfurter: I don't follow you at all.

Mr. Rugg: I won't argue with you on that.

Mr. Justice Roberts: That negatives everything you said in your argument, it seems to me.

Mr. Rugg: Oh, no. They are now excluded for the competitive advantage. You and I can start——

Mr. Justice Roberts (Interposing): If they took in all competitors, so that there were no longer a competitor outstanding, then they could close their membership?

Mr. Rugg: Take in people who have been excluded.

Mr. Justice Frankfurter: How about a new person who is in the same position of disadvantage as the excluded person? Suppose I want to go into Detroit or New York or Savannah and start a newspaper, and I am a brand-new person. Why is that any different from the position of those who, ten years ago, were from your point of view illegally and improperly excluded?

Mr. Rugg: I think that there may be exclusions even under the decree or under the amended bylaws in sympathy with the decree for reasons other than competition.

Mr. Justice Roberts: The court would have to pass upon it.

Mr. Rugg: Not at all. All the court is striking down is the exclusion for competitive reasons. They can be excluded for political reasons or religious reasons or anything else.

The Chief Justice: That is Mr. Justice Frankfurter's case.

Mr. Rugg: Which is?

The Chief Justice: He wants to be a competitor.

Mr. Justice Frankfurter: In other words, why won't there be future competitors as well as past? Do you agree with that?

Mr. Rugg: Yes, I agree.

Mr. Justice Frankfurter: I don't know what you imply by your remark about freezing.

Mr. Rugg: It is a question of degree. Two people can do it. A single trader can do it. Two or three people can do it.

Mr. Justice Roberts: The little associations can do it.

Mr. Rugg: Yes. I think it is a question of degree. There aren't any little associations that I know of.

Mr. Justice Roberts: You mean the Herald Tribune Syndicate?

Mr. Rugg: That is not an association. That is a single trader. The Herald Tribune gets the news and peddles it out.

Mr. Justice Roberts: Could the UP discriminate——

Mr. Rugg (Interposing): The UP is not an association.

Mr. Justice Roberts: I understand. It can discriminate in this way because it is a corporation.

Mr. Rugg: No, I don't think—well, I am going to come to that in a minute. They have these asset value contracts. The UP, probably, under the *Colgate* case, might have greater powers as a single-trader.

Mr. Justice Roberts: Does the UP require news of its members to be sent to its bureaus?

Mr. Rugg: It does not require; it requests.

Mr. Justice Roberts: Request.

Mr. Rugg: UP subscribers who are AP members are prohibited under Article VIII of the bylaws from furnishing any local news to UP.

Mr. Justice Roberts: Suppose it is a UP man who is not an AP man. Does it require him to send his spontaneous news?

Mr. Rugg: But not exclusively.

The history of the development of Article III is persuasive as to the current intent. This AP is a successor corporation to an Illinois corporation. In 1900 the Illinois corporation was found to be an illegal device under the Illinois law, for reasons which perhaps are not controlling here. The board of directors, however, of the earlier AP, in their formal report to the members, interpreted that decision as meaning that the AP rule providing for an alliance, offensive and defensive, between a member and the Association was void as in restraint of trade; and thereupon the present AP was set up and acquired all the assets of the former corporation.

The AP members, the earlier Association members, were divided into two categories: A members and B members. A members were given an absolute veto power over the admission of members in a field. This was not included in the new bylaws, on the advice of counsel that that would be illegal, but the old A members were given a right of protest geographically extensive and equivalent, so far as they could go, with the right of veto.

Mr. Justice Frankfurter: You said that the corporation was found to be illegal. Illegal under what law? Under the New York law under which they existed?

Mr. Rugg: The former corporation was held illegal by the Illinois Supreme Court and under Illinois law. The advice from counsel to which I alluded was in reference to the Sherman Act, I assume. There was an emphatic warning from counsel that this conditional veto which I have described in Article III was the extreme limit to which an embodiment of the old veto power could safely be attempted in the new organization. I assume he is talking about the Sherman Act.

Mr. Justice Frankfurter: That is in the record?

Mr. Rugg: Oh, yes. The letter is in the record.

Mr. Justice Frankfurter: To my recollection, there was a prior Sherman Law inquiry around 1909 or 1910.

Mr. Rugg: Yes. This statement was at the time of the organization, I think.

Mr. Justice Frankfurter: Nineteen hundred?

Mr. Rugg: Nineteen hundred.

There is a wealth of evidence in the record, unchallenged, undisputed and about which there is no issue of fact, as to the manner in which these bylaws have been administered during the forty-two years of operation. The court below decided that it was a controversial question of fact as to whether the history of the operation of the bylaws, which had been changed in 1942, was conclusive evidence of the manner in which the new bylaws would be operative. Judge Hand grimly added that the defendants were not entitled to have the court assume that the motives would not be operative in their enforcement which normally actuate human beings similarly situated. I refer to these statistics not as demonstrating what the future action will be, but as demonstrating the background in the light of which the present bylaws must be judged.

The bald facts alleged in the complaint and admitted in the answer are that between 1900 and 1928, when the power of protest was broadened, of 100 applications—a few more, 102 applications, I think—that had been submitted to the vote of the membership, that is, where there was a competing member paper in the same city and field, all but six were rejected, and of the six, all the holders but one of competing AP memberships had waived their rights and the board of directors had recommended admission. In the thirteen-year period from 1928 to 1941, but one application was submitted and that was denied.

The Chief Justice: Is it denied that they did exclude competing papers?

Mr. Rugg: Oh, no. These facts are admitted in the answer.

Mr. Justice Roberts: Mr. Rugg, I suppose a social club could exclude me. It is not in interstate commerce, and it is not in business. I don't suppose I could object. It might be a very nasty club and be very mean to me.

Mr. Rugg: But social clubs are not engaged in commerce.

Mr. Justice Roberts: The thing you are stating is that The Associated Press has not been very nice to them, but you have a question of law back of all that.

Mr. Rugg: Right; but a social club is not engaged in restraint of commerce.

Mr. Justice Roberts: I know.

Mr. Rugg: And the AP bylaws on their face are a restraint of commerce. Whether it is a vicious restraint may be another question, but they are a restraint of commerce. That is not present in the social club at all. The AP is not a social club.

Mr. Justice Roberts: I know that.

The Chief Justice: They do not give out this information to those who compete with their members.

Mr. Rugg: That is right. They exclude.

The Chief Justice: Just like my credit information group.

Mr. Rugg: Just like the *Sugar Institute* case, too, where that was struck down.

The Chief Justice: Except that I rather think the information was not of the same class as the credit information.

Mr. Justice Roberts: It was a price-fixing affair, wasn't it?

Mr. Rugg: No, as I read the *Sugar Institute* case, there was no price-fixing in that case. The exclusion deprived

the competitors of knowledge, which was detrimental to them in their purchasing.

The Chief Justice: What I am trying to isolate, to be perfectly frank about it, is this: Where there is information gathered by mutual arrangement and agreement, and the gathering of that information does not involve an infringement of the Sherman Law, does the refusal to turn it over to competitors make it an infringement of the Sherman Law?

Mr. Rugg: My answer to that is in the law that I am going to argue. I will do it now.

The Chief Justice: That is the whole crux of the case, isn't it?

Mr. Rugg: We claim that a combined refusal to deal for the sole purpose of competitive advantage of the members of the combination, as discussed——

The Chief Justice (Interposing): Dealing in information which the group have gathered, as in my case, which they could properly gather.

Mr. Rugg: All right. The commodity is news, as distinguished from the commodity of designs of women's dresses or sugar or peanuts or beans.

The Chief Justice: Or the credit information.

Mr. Rugg: Or the credit information; but the combined refusal to deal was held bad in the *Fashion Originators* case. To be sure, there was a secondary boycott there, but the predicate of the decision was on the combined refusal to deal for competitive reasons.

The second ground is that a combined denial of information collected through a joint enterprise for the competitive advantage of members of the enterprise is bad. It was bad in the *Sugar* case. *A fortiori,* when the information is the commodity itself, it is bad here.

Mr. Justice Frankfurter: Isn't that the real question? In the case put by the Chief Justice they combined to get

information that would be of benefit to others and from which rivals were excluded. Isn't the real question, the distinctive question, that in this case they are not dealing with the incidental collecting of information as a means of carrying on some other business, but you are dealing with the question of information and news as the end itself, and that brings it under the Sherman Act?

Mr. Rugg: Yes. I stated it this way: that news was the commodity. I think that is the same thing. I stated that at least once before.

Mr. Justice Douglas: So what? What difference does that make? I don't get the argument.

Mr. Rugg: The Chief Justice's proposition is that dealers in peanuts collect credit information and disseminate that among the members of the combination.

Mr. Justice Douglas: I understand that, but suppose you and I form a syndicate and go down into the jungles of Brazil to get some raw rubber, and we come back with 30,000 tons of raw rubber. We are manufacturers of tires. Do we have to give that rubber and open that to others?

Mr. Rugg: It is a question of degree. It might be.

Mr. Justice Roberts: Short of monopoly.

Mr. Rugg: Oh, yes, much short of monopoly, it might be bad.

Mr. Justice Douglas: I can see that you and I might use that rubber to crush some competitor.

Mr. Rugg: News is a unique commodity.

Mr. Justice Frankfurter: It isn't a commodity at all.

Mr. Rugg: News service is a commodity.

Mr. Justice Roberts: That is a service, not a commodity.

Mr. Rugg: What you get over the wire is the commodity. You print it, you use it, you sell it. I really have some other things that I think are persuasive, which I want to talk about.

There have been two applications that were denied under the current laws. I am not citing these as examples of illegal denials, but as the mechanics of denial. In 1941, Marshall Field filed an application. He was notified that both the Chicago Tribune and the Chicago Herald-American held protest rights in Chicago. They declined to waive their protest rights, and consequently he would have to be submitted to a vote of the membership at the annual meeting. The Chicago American is an afternoon paper, published six days a week. It publishes a morning edition on Sunday. It has a morning franchise for the Sunday paper. The Chicago Sun, which Mr. Field proposed to publish, was a morning paper. He offered to buy the franchise, the membership of the Hearst interests in Chicago for a quarter of a million dollars. That was refused.

At the invitation of Mr. McLean, the President of The Associated Press, Mr. Field started on a proxy campaign. He secured some. Colonel McCormick, the head of the Chicago Tribune, started on a proxy campaign. He had eleven of his employees visit 500 members. He got 191 proxies. They were all voted against Mr. Field. The Chicago American solicited proxies, fortunately by letter. Their letter is in the record. I should like to read one sentence.

The Chief Justice: What page?

Mr. Rugg: Page 1211, in Volume III. This was sent to all members of The Associated Press.

> "You, as a member of The Associated Press enjoy in your own community rights of protest. We believe that you consider such rights of great value. Were Mr. Field successful in his effort to overrule our protests, the asset value of your membership

> would be immediately affected and your own property rights might be similarly imperiled at any time."

In response to that appeal, the American got around 80 proxies. Field's application was defeated.

Mrs. Patterson filed an application in Washington for the Times-Herald. The Washington Post declined to waive for the morning franchise, and the Washington Star declined to waive for the afternoon franchise. Representatives of The Post and Star both spoke at the annual meeting against the admission of the Times-Herald as a member. Mrs. Patterson was defeated, and was not elected a member.

These barriers I have been talking about thus far are only on admission of members. There is another restriction in the bylaws. Article VIII provides that all members of The Associated Press shall send to The Associated Press all local spontaneous news. Section 6 of that Article provides that this news shall be sent exclusively. The wording of the Section is that:

> "The members shall not furnish such news nor permit anyone in its employ to furnish such news to anyone who is not a member of The Associated Press."

This injunction is carried out religiously. It is rigorously enforced. At the masthead of every AP paper that is published there is a declaration of that policy.

In 1941 when Mr. Field was starting to get string reporters around in lower Illinois to cover the operations of the Sun, he was advised that the fact that some people whom he wanted to employ, these string reporters, were employed by Associated Press members and consequently

were deprived of the opportunity to act as string operators, or string reporters, for him.

On the importance of AP as a news service, it is found as a fact that AP exceeds the UP, which is the next biggest, in six different qualifications: number of subscribers, amount spent, number of reporters, size of the report, etc. But the pragmatic test is much more persuasive. There are 373 morning newspapers in the country; 304 of those are AP members, and those 304, which is 81 per cent, have 96 per cent of the circulation. The UP has 153 members, which is 40 per cent in number, and only 64 per cent of the circulation of the entire morning papers. INS is even lower. The same general statistics prevail in the afternoon field, AP 59 per cent in number and 77 per cent in circulation.

A more practical test is the usage made by papers that have both services. That is in the record. The New York Times has all three. The week prior to their deposition, they made a tabulation of their use of the three services. There were 111½ columns of AP news, as compared with 43½ columns of UP news. The Chicago Daily News had 60 columns of AP news, compared with 29 columns of UP. The New York Herald Tribune had 127 to 21. Even the New York Daily News, which has built up its tremendous circulation originally on UP but which acquired an AP membership by purchase, today uses more AP than it does UP.

As to the asset value contracts, the situation in the light of which these restraints of AP is aggravated: INS and UP have what they choose to call asset value contracts whereby, if the subscriber insists on it, it is agreed that the UP will not sell to a competitor in the same city and field unless that competitor pays to the current holder of the UP service an amount that is stipulated. Those are significant

amounts and run from $20,000 to $90,000. That is a situation in the light of which these AP restraints must be viewed.

For example, the UP picture service—Acme Pictures, they call it—had an exclusive contract with the Chicago Tribune. The Chicago Sun could not get the UP pictures. That was relieved later by voluntary waiver from Colonel McCormick. The INS has had an exclusive contract with the Hearst papers not only as to news but also as to news pictures. Field was denied all access to any of the three big picture services.

The Canadian Press contract is very similar to this exclusivity feature. The Canadian Press covenants in the cartel arrangement that it will not permit any of its own papers or employees of its papers to furnish any Canadian news to any paper in the United States other than a member of AP, and the Canadian Press covers 96 per cent of the English speaking circulation in Canada.

I think I have discussed my law. There are three points.

First, the combined refusal to deal, we think, is like the situation discussed in the *Fashion Originators* case. It is similar to the situation discussed in the *Montague & Co.* v. *Lowry* case and in the *Lumber* case. The rule we take from those cases is that an attempt to exclude others from certain trade is a restraint prohibited by the Sherman Act *per se,* if the actual intended effect of it is the restraint of competition of those excluded.

Our second point is the *Sugar Institute* analogy. The collection of information, the acquisition of the fruits of a joint enterprise, denied to competing non-members to protect the competing proprietary interest of the members, we say is bad *per se* under the *Sugar Institute* case.

Finally, if you turn to the rule of reason, as did the court below, in the consideration of the impact on the non-

member competitors of AP, that impact is the denial to them of the right to choose freely between the three largest news services operating: AP, UP, and INS. That is a detriment; that is a restraint in commerce. That is a restraint that is not challenged, that is not denied, and about which there is no substantial issue of fact.

Further, looking under the rule of reason as to the impact on the ultimate consumer, it is a matter of common knowledge that the ultimate consumer is best served by free, unrestricted and untrammeled dissemination of news, with as many different facets and as many different colors as possible. News is history. History is not a photographic reproduction of all events. It is an editing; it is a selection; it is a culling of events. When one of those methods—the biggest, the largest, the most popular—is denied for competitive reasons to members of the press (and that fact is not denied, and about that there is no issue of controversy of fact whatever) that is proof within the degree required by the rule for summary judgment that there has been an unduly detrimental injury to both the intermediate and the ultimate consumer of the news, in violation of the rule of reason under the Sherman Act.

ARGUMENT OF WENDELL BERGE, ESQ.,

on behalf of the United States of America:

Mr. Berge: May it please the Court, I shall first discuss the agreement between all AP members not to sell or exchange their local spontaneous news with non-members and to make such news exclusively available to each other. This agreement is embodied in Article VIII of the bylaws. The court below held that the bylaw with reference to exclusive exchange of spontaneous news was a restraint of trade, but it held that, taken alone, it was not illegal but only illegal

when taken in connection with the membership requirements.

The court enjoined this bylaw, but gave permission to apply for relief from the injunctive provision if and when the membership discriminations were corrected. We think that the injunction against this bylaw should have been absolute and should obtain irrespective of whether the membership discrimination is adequately covered in new bylaws.

The Chief Justice: Will you explain what the effect of that would be if it were absolute? Who could get into the AP, and how?

Mr. Berge: The effect would be that the contract between AP members embodied in Article VIII of the bylaws, that they would not sell or exchange their local spontaneous news with non-members, would be invalid. The AP would still have the right to the spontaneous news of its members in the same way that UP and INS today have the local news of their members who are not members of the AP. Simply the exclusivity features would be eliminated, and the question goes right to the heart of the restraint.

The Chief Justice: Suppose an application came in, and they filed it and didn't look at it. How would the decree operate then?

Mr. Berge: An application?

The Chief Justice: For membership.

Mr. Berge: I am not discussing, Your Honor, the membership provision. I am saying that we maintain that there should be an absolute injunction against members of the AP refusing by agreement to supply local news to non-members. That is all that this particular portion of my argument is directed against.

The previous discussion of the case has brought out that many members of the AP are also subscribers to the

services of UP and INS. UP and INS like to get local spontaneous news from their subscribers, but when the subscriber happens also to be an AP member, he strikes out from the contract he makes with UP or INS the provision that news of spontaneous origin shall be furnished to UP or INS. In other words, they cannot get from their own subscribers this local spontaneous news if the subscriber happens to be an AP member, which means that a majority of the daily newspapers of this country are barred from furnishing news of spontaneous origin in their communities to any but AP, and it means, therefore, that in the large cities where other news services can maintain independent staffs—in cities like Washington and New York—this restraint does not operate with such severity, but in vast areas of the country, where there is perhaps only one newspaper, and that is an AP member, the country being blanketed with AP members, the local news from that community is unavailable under the bylaw to any other news service except AP.

The brief of the opposition undertakes to minimize the importance of this restraint, but when you read the undisputed testimony—among others, the testimony of Connolly of INS, upon whom they rely—Connolly's testimony as a whole indicates that his remark that the restriction was not severe was limited to INS in its operation in cities, where, of course, they have some staffs of their own; but he goes ahead and states that of course where they don't maintain a staff of their own, they are disadvantaged by the competition with the AP bylaw and that of course they would like to be able to get the local spontaneous news from all of their members.

Let me take up briefly the Canadian Press contract. Mr. Rugg has already mentioned it. AP has a contract with the Canadian Press, which is the largest single source of news

in Canada, whereby the two associations agree with each other to exchange their news exclusively and not to make it available to any other agency in the respective territories of each.

The Canadian Press is a non-profit membership corporation, operating very much like AP. It is described by Mr. Kent Cooper, of The Associated Press, as being the Canadian counterpart of AP. That is in the record. Canadian Press has over 90 per cent of the English-language papers of Canada in its membership, and over 95 per cent of the circulation of such papers. Its 87 regular members have a daily average circulation of 2,350,000 and there are only 7 daily English-language papers in Canada not members of Canadian Press. They have a daily circulation of 116,000. Thus, the ratio of members of Canadian Press to non-members is more than 12 to 1, and on the circulation basis, it is more than 19 to 1. Thus, AP gets a monopoly in this country on the distribution of news from the largest Canadian newsgathering agency.

Again, our opponents try to minimize the importance of this. They point to the fact that other news agencies do maintain staffs in Canada. They point to the testimony of the Manager of United Press. It is true, United Press has a subsidiary in Canada, British United Press, but even the British United Press cannot get news of local spontaneous origin from its subscribers who are members of the Canadian Press. It is the same sort of disability that the UP and the INS operate under in this country.

Again, the testimony with reference to UP, which has, admittedly, a large foreign organization for collection of news. UP is perhaps the one agency, the one competitor of AP, that is in a position to render effective competition in the Canadian field with this disability, because United Press has always specialized in its foreign news,

and it does have a large foreign staff. But if this contract bears down even on UP with respect to its members who are also members of AP, it follows that, as to the twenty or thirty smaller newsgathering agencies in this country who can't maintain staffs and own subsidiaries in Canada as UP does, this Canadian Press contract bears down all the more onerously.

Mr. Justice Frankfurter: Is it your suggestion that this is not objectionable, once AP is liberalized?

Mr. Berge: No, Mr. Justice, we don't agree with that. That is, we think also that this Canadian Press contract should be enjoined to the extent that it requires exclusive dissemination in this country to AP.

Mr. Justice Frankfurter: Taken by itself, regarding nothing else in the case, it would invoke the application of the Sherman Law?

Mr. Berge: Yes, I do think so. I just want to point out, if this is approved between this country and Canada, there seems to be no reason why similar contracts can't be made between dominant newsgathering agencies in other countries.

Mr. Justice Frankfurter: Suppose other countries, as a matter of their own policy, agreed to that kind of singleless, that kind of concentrated news service.

Mr. Berge: If other countries have news cartels that require—I realize that Your Honor would prefer the use of another word, but Mr. Kent Cooper has recently written a discussion in a current magazine about the operation of worldwide news cartels, and we agree with what Mr. Cooper says as to the general policy that should be applicable. He said:

> "There should be freedom for journalists everywhere in the world both to seek out news with equal

access to all and to send it without censorship; freedom of news organizations to publish it and freedom of news agencies to compete with one another or to exchange news on an unlimited basis.''

Mr. Justice Frankfurter: Maybe Mr. Cooper hasn't instructed his counsel.

The Chief Justice: That is very interesting.

Mr. Berge: I can tell you what the facts of the case are, if I may. I think I can tell you what the situation has been historically in this field; that up until about 1932 there was a network of agreements for exclusive exchange of news, to which AP was a party, and it substantially covered the principal European countries—Germany, France, and Great Britain. AP broke out of it in 1932, repudiated it, and since then, so far as I know, they have not been parties to any European exclusive exchange agreements. Once they made a contract with United Press that neither they nor United Press would enter into an agreement with a European news agency for exclusive exchange of news, unless the news were made equally available to each.

The whole point of this is that Canada was excluded from that policy of AP at the time that they repudiated the European news cartel. There is still in existence in this agreement the same kind of agreement that, as far as they are concerned, has been repudiated in the rest of the world. We think this should go out, too.

Mr. Justice Murphy: The dissemination of news, I think you will agree, can be an instrument of oppression, can it not?

Mr. Berge: Certainly.

Mr. Justice Murphy: I should like to ask, along the line of Mr. Justice Frankfurter's question, that while it is

treated in a commercial way, it isn't a business activity as such, in the sense of selling a security or marketing electric power, is it?

Mr. Berge: Mr. Justice, I would answer that this way: I think I would go with the lower court's opinion. I agree with you in what I believe to be the implication of your question, that the public consequence of a restraint in this field may have entirely different and more serious overtones and consequences than a restraint with respect to peanuts, which were mentioned yesterday, or some other commodity.

I should like to add as a corollary, because we are depending on it, that I think from the legal theory standpoint, news is a commodity of interstate commerce, and the distribution of news under modern conditions is certainly subject to the antitrust laws. This Court expressly said so in *The Associated Press—National Labor Relations Board* case.

Mr. Justice Murphy: Is there any history, any record, of an attempt to get Congress to legislate about this?

Mr. Berge: I haven't detailed familiarity with this, but I believe that back about 1912 there was a bill proposed. I think there is reference to it in one of our counsel's briefs. It did not pass, but I am sorry I can't give you the detailed history of it.

We are not contending, as Mr. Rugg stated, which is going to be my next point, that the distribution of news in this manner is a public utility. I think that the argument yesterday gave a wrong emphasis to the effect of the lower court's decision with respect to the effect of this judgment. I mean, in the first place, the judgment itself (I am going to argue in a moment for a modification of it) doesn't require the opening of AP to any and all comers. It forbids the

exclusion upon conditions imposed by a competitor in the field, and it also requires that there shall not be taken into account the effect of admission upon ability to compete with a member.

So, the terms of the judgment itself show, I think that the court was not seeking to give to news agencies a public utility status, but was only trying to eliminate what we regard as undue restraints of competition.

Let me just state what I think the effect of this whole public utility thing comes to. The lower court termed it a red herring, and I think that it is, because I think this judgment, like those traditionally entered in Sherman Act cases, is directed against concerted refusals to deal. In the case of a conspiracy not to deal with competitors, competitors of one's customers, an injunction against the continuance of the conspiracy is always tantamount to a direction to deal without regard to the factors that led to the concerted refusal; and if the concerted refusal is for suppression of competition, the injunction to cease refusing for that reason is an injunction to deal without regard to effect on competition. You have that situation repeatedly in Sherman Act judgments.

There is nothing that confers public utility status upon a trade association that is subject to such an injunction. Competitors may form associations for legitimate purposes. Of course, they don't thereby become public utilities. They have membership requirements, but an association having a dominant marketing position cannot exclude members for reasons relating to suppression of competition. But the impediment is not any public utility status. The impediment is the Sherman Act. I don't think that there is anything in this judgment that confers any unique status on these people.

The discussion of the lower court's opinion about affectation with public interest, upon which Mr. Cahill relied, I think was misconstrued. I think the court proceeded on very orthodox reasoning. The court below first found—at least, the opinion states—that the AP bylaws were a restraint of trade. That is stated in the opinion. It is on page 2588. It is there. Then, second, they considered whether the restraint was unreasonable, and there are half a dozen pages of discussion as to whether the restraint was unreasonable.

In considering whether the restraint was unreasonable, it is true the court gave consideration to the public interest in the free dissemination of news; and in discussing that, surely the court did consider the effects of suppressing distribution of news. The public interest and the free distribution of news—the factors which perhaps were in Mr. Justice Murphy's mind in the question which he asked me—were considered properly in connection with whether or not this was a reasonable restraint. They weren't considered with reference to any notion that there was a public utility obligation conferred to take anybody just because news distribution is something different.

This phrase, "full illumination," on which our opponents try to build up some new theory of the Sherman Act, is entirely overstressed in our opponents' argument. The phrase, "full illumination," is buried in an opinion which is embellished with various figures of speech, metaphors, and similes, and is part of the reasoning. It was a phrase used merely to emphasize Judge Learned Hand's point that the public does have an interest in full dissemination of news, but it didn't enunciate any new legal doctrine.

The Chief Justice: Is there any legal justification for the application of the Sherman Law, except the prevention of restraint?

Mr. Berge: I think I could agree with you that the legal justification for the Sherman Act is the prevention of restraints in competition.

The Chief Justice: Protecting commerce.

Mr. Berge: Quite right. But this court holds that some restraints are illegal *per se* and that other restraints are illegal on account——

The Chief Justice (Interposing): Only because they have those effects.

Mr. Berge: But in those cases where this court is not prepared to hold that a restraint is illegal *per se,* this court, in determining reasonableness, will weigh the extent of the restraint on competition and certainly, incidentally, the effect on the public interest.

The Chief Justice: Doesn't that really narrow down to whether the exercised restraint involves an interest which we protect, the reasonableness of the restraint in the common law sense?

Mr. Berge: Yes.

The Chief Justice: That is precisely why I wanted to put the case I did about the gathering of information for the benefit of the group of competitors.

Mr. Berge: Could it not be stated this way: That while the Sherman Act operates on restraints of competition, the deeper policy behind that is that the public interest is served by competition. So, when you have a particular problem where there is a restraint, it is a question of whether it is of substantial character such as to contravene the Act, and I take it that courts must weigh (at least so Judge Learned Hand felt) the weight of the restraint as against the public interest in this case in carrying on their business in their own way.

We can rest this case on Judge Hand's decision, but I go further than that. I don't want to dwell on this because

I have another point or two, but in our brief we have emphasized our belief that when you take these cases, *Montague* v. *Lowry, Fashion Originators Guild,* and half a dozen other cases including the *Sugar Institute* case, and add them all, it comes down to this: We submit to your Honors that it is *per se* illegal for competitors to make an agreement to exclude others from certain trade, if the actual and intended effect is to restrain the competition of those excluded. That is on pages 74 and 75, and we have developed it at some length.

Whether the Court goes so far as to hold with us that this kind of restraint is illegal *per se* or not, you can still fall back upon the reasoning of Judge Hand, which I think also is sound.

I want to mention just this one thing also in connection with the public utility status that they try to attribute to this decision. The essence of a public utility, of course, is that it must take in everyone. While I think I made it clear that that isn't the effect of this judgment, yet let us just test the thing about which they complain in protesting their belief that this makes them a public utility, with their own practice. In memberships acquired by the purchase of a member paper, no power of choice of associates has ever existed in the AP organization itself. A paper may be entirely transformed by new ownership, by new management. Its policies may be different. The owner of the newspaper may have an entirely different impact on the other members of AP than the preceding owner, and yet he automatically has a right to membership upon filing proof that he is the owner of the paper and upon paying the reasonable assessments. In other words, AP itself has undertaken to serve all comers, if they come by way of purchase of a daily newspaper already having an AP membership.

Mr. Justice Reed: Is it the Government's argument that this decree does not compel the admission of an applicant when he comes and asks for membership?

Mr. Berge: The Government's position is that the decree prevents his exclusion for reasons of competition. You see, Mr. Justice, we must emphasize all the way through here that where an applicant applies for AP membership from a field where there is not a member—let's assume there is no member in Fairfax, Virginia, and someone applies from Fairfax—membership is quite automatic. I don't mean they haven't the power to exclude, but the directors can elect them.

Mr. Justice Reed: And he comes in automatically.

Mr. Berge: That is right. There are two ways to get in almost automatically.

Mr. Justice Reed: What does this decree do? Does it exclude him on the ground of competition?

Mr. Berge: You can't exclude on the ground of competition, and that brings me to a little point which we think isn't quite right about this decree. We don't think it makes it quite clear enough what ought to be accomplished. Let me take just a moment or two on that, because it constitutes part of the basis of our appeal.

The decree, in its present terms, first strikes down the existing membership bylaws. They are out.

Mr. Justice Reed: Have you printed that anywhere?

Mr. Berge: Oh, yes. It is in the record. It is Point 3 in our brief. On page 115 and the pages following we discuss the modification that we want, and I can tell you in the next three minutes, I think, what it is.

The present decree says that they cannot in their new bylaws—they are given a chance to propose new bylaws, but the decree indicates what the new bylaws shall be. The new bylaws shall provide that existing members in the same

city and field shall not have power to impose or dispense with conditions upon admission of an applicant. That is the first condition. The competitor in the field where the fellow comes from can't impose conditions or dispense with them; that is, to eliminate the veto power that the competitor has.

Then, the second point is that the bylaws shall affirmatively declare that the effect of admission on the ability of an applicant to compete with an existing member in the same city and field shall not be taken into consideration in passing on an application.

Here is the loophole: The trouble is that under this decree there is nothing to prevent AP from setting up new bylaws which provide different standards of admission from fields where there is presently a member and from fields where there is not. It can set up different standards of admission making it more onerous and more difficult to get in from a field where there is a competitor so long as the veto power isn't exercised by the local competitor itself. In other words, they can transfer the burden of excluding the competitor in a field where there is presently a member to the whole membership.

In the appendix, page 137, the last page, we have stated verbatim how we would like to have that decree amended so that it is perfectly specific that the procedure and conditions of membership shall be the same for appicants from a field where there is a competitor as for applicants from a field where there is not.

If there is any question in your minds as to whether this is a real point, just let me read in closing from a statement recently delivered at the Missouri Press Association by a prominent newspaper man, pointing out the possibilities of evading the present decree. He says——

Mr. Justice Reed (Interposing): Your suggestion would require a freezing of the membership?

Mr. Berge: Oh, no, not at all. I am suggesting that the same standards be required whether or not there is presently a member in the field from which the applicant comes.

Mr. Justice Reed: You would say they will take no more members.

Mr. Berge: I believe, Mr. Justice, that that would be bad, because it would mean that the way would be open to exclude members for competitive reasons, and I will refer merely to the danger——

Mr. Justice Roberts (Interposing): Exclude them all, for any reason? Why not?

Mr. Berge: There would be a great suspicion arise that they are so anxious to exclude them for competitive reasons that they would exclude everybody.

Mr. Justice Roberts: Suspicion would arise on every election, and you would be going to the circuit court of appeals or to this special court on every election and saying there is exclusion.

Mr. Berge: I suggest, your Honor, that the difficulty there is no greater than was involved in your decision in the *National Labor Relations Board* case. I think the question is about the same, and if these people have a good-faith intention of complying with the decree, the difficulties of judicial supervision will be no greater than they are in carrying out the orders of the National Labor Relations Board.

(Whereupon, at 2:00 p. m., a recess was taken.)

After Recess.

Rebuttal of John T. Cahill, Esq.,

on behalf of The Associated Press:

Mr. Cahill: May it please the Court, I will attempt to cover a scattering of points in the nine minutes that I have remaining to me.

The Chief Justice: You have ten.

Mr. Cahill: I have ten? Thank you, Mr. Chief Justice.

Mr. Justice Roberts: Why don't you take that?

Mr. Cahill: I want to begin by denying that The Associated Press has ever admitted anywhere or at any time that The Associated Press has in any way injured the public. I wish to state that not only do we deny that statement, but that we were proud to admit the allegation in the Government's complaint that The Associated Press pioneered in the collection and reporting of unbiased and truthful news to which others have since adhered.

Turning to the question as to whether there is one particular agency that is the best, I wish to point to Finding 36 in this record. Finding 36 sets forth clearly and expresssly that there are three news agencies in this country.

The Chief Justice: Is that in the fifth volume?

Mr. Cahill: It is in Volume 5, Mr. Chief Justice, on page 2610.

I might read the first sentence. It deals with the three big ones. It begins at the bottom of page 2610, Finding 36:

> "There are many news gathering organizations of one sort or another in the United States, of which only three, AP, UP, and INS, are comparable in size, scope of coverage, and efficiency."

Turning to page 2585, which is the opinion of the court on this point, the middle of the page, I am quoting the second sentence from the end of the first paragraph:

> "Upon this motion we must take it as in dispute whether the general opinion in the calling is that the service of UP is better than that of AP or vice versa. Many prefer the foreign and financial services of UP, some even its domestic service."

So that for the purpose of the submission by the Government and ourselves on this record, it is in dispute as to what is the opinion as to which is best.

Mr. Justice Frankfurter: Finding 66.

Mr. Cahill: Yes, "AP is a vast, intricately reticulated organization, the largest of its kind."

Mr. Justice Frankfurter: That qualifies what you said.

Mr. Cahill: Let me point out to you that the finding in that respect is in turn modified, if you pursue this far enough, by certain of the contentions of the United Press, because on summary judgment, and I might as well address myself to it now, where you have a five-volume record it is practically impossible to cull out of the record everything that there is in it that bears on a particular point. I just illustrated in about ten pages in my appendix the number of basically disputed issues of fact there are here.

Turning to the question of the admission of applicants to membership, Mr. Rugg pointed out this morning that as to those who came before the membership where there was a paper already in the field, only 5 per cent were admitted. Mr. Rugg did not at that time call attention to the fact that over 200 of the present members were admitted by the Board, although they were in fields where there was already a member, but that they were admitted by the Board

by reason of waivers having been given by those already in the field.

A word on the local and Canadian news. Those two issues are not nearly so important to the Associated Press as the issue of the right to determine its membership. I might, however, point out that the UP and the INS do state their position in affidavits that they are not handicapped by the AP local news and Canadian contracts.

Turning to the next question that was asked several times this morning, as to whether the AP must admit all, I think any doubt on that can be resolved once and for all by quoting first from the opinion, and I will take page 2599 of the majority opinion. At the top of that page (the first word is on the bottom of page 2598):

> "Neverthless, in all such cases the power must not be incident to a combination which, though bound to admit all on equal terms, does not do so."

citing for the statement the *Terminal* case in St. Louis.

I have not time to read it but I do wish to direct specific attention to the Government's assignment of Error No. 3 in this Court, where it lays down its complaint that we should be entitled to exclude anybody only for the three reasons assigned in that specification. They are (1) that the applicant is not the owner of a paper; (2) that the applicant has not assented to the lawful bylaws; and (3) that the applicant has not paid his proportionate share of the tangible assets.

I think, of course, that the decisive point in this case is the law point. I think that the Government is saying in effect that something short of monopoly causes you to violate antitrust law. At the same time, in their brief they read out the application of the rule of reason. They say

it is a question of degree. Now, what is that degree? The degree is that if you are a hair's breadth better than your competitor, upon gaining that advantage you violate the antitrust law. As I said in my original argument, it is the egalitarian concept of economics.

In submitting this case on behalf of The Associated Press, I feel that not only are we partaking in what is truly a historic occasion, but that I can certainly find no higher plane on which to close the case than to quote from the opinion of this Court in the *Barnett* case three sentences:

> "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a rational basis for adopting, but freedom of speech and of press, of assembly and of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

This is a country where today multiple private news agencies, with freedom of access to the sources of the news, operate and compete vigorously and well and in the public interest. Those agencies have set the highest standards of journalism in the world. In this great achievement, AP, scrupulously refraining from coercion or monopoly, has played a constructive and most praiseworthy role.

We will approach the peace table with the firm resolve to show and, we hope, to convince the world that a free press, whatever its failings, is greatly to be preferred to a press subject to governmental control. The outcome of this

case is awaited with great interest, not only here at home, but throughout the world. The public has been informed, and the lower court has so found, that there is no monopoly of the press in this country. Should we now abandon the guiding principles of free competition as applied to news agencies and bring these agencies of the press under Government supervision? We submit that the adoption of such a course would give aid and comfort to the forces throughout the world that seek to make the press a subservient instrumentality of government.

Mr. Justice Rutledge: Do you mean by that that the press as such, even though it were a proved monopoly, could not be subjected to the antitrust laws?

Mr. Cahill: No, Mr. Justice, I take it that if the day comes when The Associated Press becomes a monopoly, inescapably The Associated Press will be regulated, and that, Mr. Justice, I submit will be a sad day not only for The Associated Press but for the United States as well.

(At 2:40 p.m. the case was concluded.)

(Mr. Justice Jackson was not present throughout the hearing in this case.)